No. 84-1366

Office - Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a constitutional doctrine of executive discretion by which the Executive Branch is free to decide the extent to which it will meet requirements of a Consent Decree against the United States.

2. Can the Executive Branch, consistent with a Consent Decree requiring the United States to "make every good faith effort to find and provide every available form of financiai resources" for implementation of a school desegregation plan, lobby against legislation to appropriate funds for the Plan.

3. Can the Judicial Branch require the Executive Branch to take affirmative action to remedy past violations of the Consent Decree.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Board of Education of the City of Chicago respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. 1a-17a) is reported at 744 F.2d 1300. The findings of fact and conclusions of law of the District Court (App., infra, pp. 18a-215a) are reported at 588 F.Supp. 132. The remedial order of the District Court which was appealed by the United States to the Court of Appeals (App., infra, pp. 216a-233a) is reported at 592 F.Supp. 967.[1]

[1] Earlier findings of fact and conclusions of law of the District Court in this case, together with an accompanying order (App., infra, pp. 234a-268a) are reported at 567 F.Supp. 272 and the prior opinion of the Court of Appeals (App., infra, pp. 269a-281a) is reported at 717 F.2d 378.

JURISDICTION

The judgment of the Court of Appeals (App., infra, p. 297a) was entered on September 26, 1984. A timely petition for rehearing was denied on November 30, 1984. (App., infra, p. 298a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the Constitution of the United States provides in pertinent part: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, Section 2 states in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ... to Controversies to which the United States shall be a Party;..."

Article II, Section 3 provides in pertinent part: "[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient;...."

Public Law 98-107, Section 111 (97 Stat. 742) [the "Yates Bill"] provides:

> There is hereby appropriated $20 million to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans," to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the Consent Decree entered in United States District Court in the case of the *United States of America* against the *Board of Education of the City of Chicago* (80 C 5124) on September 24, 1980.

This case also involves certain other statutes and regulations of the United States Department of Education, the pertinent texts of which are set forth in the Appendix. The citations for these are: 42 U.S.C. § 2000c-4 (App., infra, p. 299a); 20 U.S.C. § 3815 (App., infra, p. 299a); 20 U.S.C. § 3832 (App., infra, p. 300a); 20 U.S.C. § 3851 (App., infra, p. 302a); Public Law 98-139, Title III (App. infra, p. 303a); Public Law 98-619, Title III (App., infra, p. 305a); and 34 Code of Federal Regulations Part 760 (App., infra, pp. 307a-318a).

STATEMENT

This case arises from a Consent Decree for the desegregation of the public schools in Chicago, Illinois. The present proceeding raises important legal issues concerning the relationship between the judiciary and the other branches of the federal government. It concerns the constitutional power of the judiciary to enforce consent decrees against the United States. It also involves the extent to which obligations under consent decrees by which the United States is bound are nonetheless subject to the discretionary decisions of the Executive Branch.

On September 24, 1980, the United States filed a complaint in the United States District Court for the Northern District of Illinois against the Board of Education of the City of Chicago (the "Board"), alleging that its schools were racially segregated. (App., infra, 269a) The complaint asked for an order requiring the system-wide desegregation of schools. The District Court had jurisdiction of the case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

Simultaneously with the filing of the complaint, the United States and the Board presented a Consent Decree to the District Court which was entered on the same day.[2] The Decree did not

[2] The Decree is reproduced at App., infra, pp. 282a-296a.

itself contain a plan of desegregation, but under it the Board was obligated to develop and implement a system-wide desegregation plan. The Board, which serves over 400,000 students, is the largest school district to have been the subject of a Federal court order requiring system-wide school desegregation. (App., infra, 26a)

The Decree had two objectives: maximizing the number of white and minority children attending school together given the demographics of the Chicago public schools, and the implementation of compensatory educational programs in schools expected to remain racially isolated. It took into account the anticipation of the Board and the United States that a plan to accomplish these goals would be expensive. Given its state of severe financial distress, the Board had made clear to the United States that it would need federal financial assistance in order successfully to implement the system-wide desegregation plan required by the Decree. (App., infra, p. 31a) Accordingly, under Section 15.1 of the Consent Decree the United States and the Board each agreed and are obligated

> to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The United States' financial commitment under Section 15.1 was a key reason that the Board agreed voluntarily to implement a desegregation plan.[3] (App., infra, p. 31a)

At the time the Consent Decree was entered, the United States had an extensive program of federal assistance for local school districts implementing school desegregation plans.

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[3] The Board had otherwise planned to counterclaim against the United States for its role in segregating the Chicago schools (such as in promoting segregated public housing). (App., infra, p. 27a) See e.g., *Hills* v. *Gautreaux*, 425 U.S. 284 (1975). To the extent that the United States had been found liable on these counterclaims, it would have been required to assist the Board in financing its desegregation plan.

(App., infra, p. 1a) However, it was clear from the language of Section 15.1 that the obligations of the United States were not limited to particular existing programs, but encompassed any and all funds which were or could be made available for assistance to the Board's plan. (App., infra, p. 32a) Thus, under the Decree the obligation of the United States was to "make every good faith effort" to find and provide funds to the Board regardless of the particular funding arrangements which would pertain from time to time.

The desegregation plan (the "Plan") which was developed by the Board in 1981 and 1982 sought to produce the greatest practicable number of physically desegregated schools. This result was to be achieved by educational programs and techniques which would attract children to integrated and desegregated schools, without requiring mandatory reassignment of children. (App., infra, p. 49a) Because of the small proportion of white children in the Chicago schools[4] (less than 15.6% in school year 1984-85), it was also recognized in the Decree and the Plan that a significant number of schools would remain racially isolated — predominantly minority in enrollment. (App., infra, p. 31a) For children in these schools — for whom a desegregated education (in the sense of having black and white children in the same school) was not possible — the Plan provided for substantial compensatory educational remedies. These remedies were designed to ameliorate the effects of past segregation on black and Hispanic children attending these schools. (App., infra, p. 113a) *See Milliken* v. *Bradley*, 433 U.S. 267 (1977).

The United States closely monitored the Board's development of the Plan. Both its pupil assignment and educational remedies were praised and endorsed by the United States.

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[4] Supp. App., infra, p. S-1. Since school year 1983- 84, the level of white enrollment has declined slightly. This decline was projected by the Board and was the subject of testimony before the district court.

(App., infra, pp. 40a-44a, 51a) The Plan was approved by the District Court on January 6, 1983. Objections by various groups seeking to intervene were denied. No appeal was taken from that judgment.

The Plan involves considerable expense, both for its educational and student assignment portions. The District Court found that for the 1984-85 school year the level of funding required for implementation of the Plan is approximately $171 million. (App., infra, p. 222a) It also found that despite the Board's best efforts to provide funding for the Plan, the Board would be unable to fund approximately $103 million of those costs. (App., infra, p. 224a) Through the 1983-84 school year, the Board itself had spent approximately $120 million for Plan implementation.

At the same time the Board was preparing its Plan, and notwithstanding the United States' obligation under Section 15.1, the Executive Branch, including particularly the Department of Education, determined that no material financial assistance should be provided by the Federal government to the Board for its desegregation programs. The Department sought generally to discontinue such assistance for all school districts. With respect to the Board, it did not make any efforts to seek alternative funds or find other means to abide by the Consent Decree obligations to which the United States had agreed. (App., infra, pp. 132a-136a, 138a, 198a-200a) Indeed, the Executive Branch has been unremitting in its determination not to provide financial assistance to the Board, not only by refusing to make "good faith efforts" to find and provide funds but also by taking efforts to ensure that the Board would not receive funds that otherwise would have been available. (App., infra, pp. 132a-139a, 144a-145a) It is this renunciation by the United States of its financial obligation to that gives rise to this Petition.

The failure of the Executive Branch to comply with Section 15.1 of the Consent Decree has been evidenced both by

decisions of the Department of Education as to the use of moneys appropriated to it by Congress for purposes including desegregation assistance, and by the Executive Branch's recommendations and activities with respect to potential or pending appropriation bills.

Before 1982 the major source of funding for federal desegregation assistance had been the Emergency School Aid Act ("ESAA"). (App., infra, p. 238a) At the instigation of the Department of Education, this Act was repealed, effective July 1, 1982. Together with a number of other categorical grant programs, ESAA was replaced with a program of educational block grants to the states. (App., infra, p. 237a) *See,* Devins and Stedman, NEW FEDERALISM IN EDUCATION: THE MEANING OF THE CHICAGO SCHOOL DESEGREGATION CASES, 59 Notre Dame Law. 1243 (1984).

This change did not mean that federal funds in the block grant program could not have been allocated to the Board for the Plan. In fact, the block grant authorizing legislation permits the Secretary of Education to require states, in distributing funds to local districts, to apply a priority which ensures that districts receive assistance in meeting their constitutional obligations to desegregate schools. (*See* 20 U.S.C. § 3815) However, the Secretary did not require any such priority, either generally or specifically with respect to the Board, notwithstanding the Consent Decree's "every good faith effort" requirement. And the State of Illinois has not applied any such priority in allocating funds it receives under the block grant program. (App., infra, pp. 108a-110a, 239a-240a)

Enactment of the block grant legislation, moreover, did not foreclose the ability of the United States to find and provide other direct financial assistance for the Plan. For the period from the District Court's approval of the Plan through the current school year, Congress in each year has appropriated substantial sums of money to the Department of Education for purposes which lawfully included financial assistance to local

school districts for desegregation programs. These include funds which were appropriated for desegregation training and planning programs authorized under Title IV of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000c-2 - 2000c-4) ("Title IV"). Over $24,000,000 was appropriated for this purpose in fiscal years 1983 and 1984. (App., infra, p. 123a)

Also among these funds were appropriations to the Secretary's Discretionary Fund. (App., infra, p. 126a) The Discretionary Fund authorizing legislation specifically allows a portion of these appropriations (over $18,040,000 in fiscal year 1984) to be used for grants to local school districts for desegregation purposes. (20 U.S.C. §§ 3832(3) and (7), 3851(a)) As to these appropriations, the Secretary has in each year determined not to spend them to provide direct desegregation assistance to the Board. He has chosen instead to allocate all Discretionary Fund money for purposes other than desegregation and to make no direct grants of Title IV desegregation funds to local school districts. (App., infra, pp. 237a-238a, 123a-124a, 134a-135a)

Moreover, in each fiscal year in question substantial amounts were appropriated generally in a lump sum to the appropriations account containing the Title IV subaccount. (App., infra, p. 128a) To the extent he determined appropriate, sums could have been "reprogrammed" by the Secretary,[5] without further Congressional approval, for distribution to

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[5] Reprogramming is a well-established federal budgetary practice. Where Congress appropriates funds generally (or in a lump sum) to one appropriation account, the Executive Branch is permitted, without seeking further congressional approval, to allocate these funds as it chooses among the programs comprising the account. See e.g., *International Union, United Automobile, Aerospace, Etc. Workers v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984). For example, the Secretary could have allocated or "reprogrammed" funds from the other programs in the same account as Title IV into the Title IV program. Once reprogrammed into the Title IV program, these funds could have been distributed to the Board for desegregation assistance.

school districts through the Title IV or other programs. (App., infra, p. 128a-129a) As to these "reprogrammable" appropriations, the Secretary in each case has declined to reprogram the funds for use by the Board.

As to Title IV and other "reprogrammable" appropriations, the Executive Branch has in each year since 1982, asked Congress not to appropriate amounts for these purposes. After amounts were appropriated, it asked Congress to rescind the appropriations, and when this was not done, the Secretary of Education determined not to spend any of the funds for implementation of the Plan (or other direct desegregation assistance to school districts). He has instead, within the authorized scope of the appropriations, determined to use all of the appropriations for other purposes.

In short, the Secretary has decided that no financial assistance should be provided for the Plan. He chose in virtually every case to spend appropriated money on purposes other than for assistance to the Board. The result of his actions is that the Board has received no material financial assistance from the United States even though funds were undeniably available. This is consistent with the United States' contention that it has no judicially enforceable obligation to provide any amount of available financial assistance to the Board and that it is constitutionally free, regardless of Decree, to decide how to spend all money which Congress has given it discretion in allocating.

In addition to these administrative steps, the Executive Branch has persistently declined to take further good faith efforts to find funds by seeking legislation which could provide other assistance to the Board, including reappropriating lapsing appropriations which the Department did not spend during a fiscal year.[6] (App,. infra, p. 135a-136a) Similarly, the Execu-

[6] In contrast to reprogramming, reappropriation is a practice by which funds from one appropriation account are transferred into a

(Footnote continued on following page)

tive Branch has contended that it is constitutionally free to engage in lobbying activities to influence the amount of desegregation funding to be appropriated by Congress both generally and for the Board, specifically without judicial limitation and regardless of the Decree. (App., infra, pp. 8a, 15a, 217a-218a) Thus, the United States has asserted that despite the Consent Decree, it is within the constitutional discretion of the Executive Branch to lobby against passage of legislation which would make desegregation funds available specifically to the Board and to lobby in support of legislation which would render otherwise available Department of Education appropriations unavailable for the Plan. (App., infra, p. 8a, 15a, 217a-218a)

District Court-First Decision

After repeated unsuccessful requests to the United States for it to undertake a plan to find and provide available funds, the Board petitioned the District Court to enforce the Decree. On June 30, 1983, after an evidentiary hearing, the District Court found that the United States had violated Section 15.1 of the Consent Decree.

The District Court held that the United States was obligated under the Decree to take every affirmative step within its legal authority to find and provide financing for the Plan. (App., infra, pp. 254a-255a) It found that the United States had failed to meet this obligation (1) by failing to make available to the Board amounts appropriated for programs under which the Secretary of Education could lawfully provide assistance for the Plan, (2) by not utilizing its statutory

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(Footnote continued from preceding page)

second appropriation account. After this transfer, the reappropriated funds may be spent for any of the programs authorized in the second account. Because separate appropriation accounts are involved, congressional action is required to effect such a transfer or "reappropriation" of funds. (App., infra, p. 180a)

authority to reprogram unallocated or unspent appropriations for desegregation programs in general, or for the Plan specifically and (3) by not taking steps to assure that the allocation by Illinois of federal educational block grant funds took into account the desegregation needs of the Board. (App., infra, p. 239a)

The District Court accordingly ordered the Executive Branch of the United States "to undertake immediately an active and affirmative program of making every good faith effort to find and provide every available form of financial resources adequate" for the Board's Plan. This program was to include efforts to provide funds that under the terms of Congressional appropriations were available for local desegregation assistance. It also was to include efforts as necessary to secure Congressional approval for reappropriation of unspent moneys originally appropriated to other accounts of the Department of Education and efforts to initiate or support other legislative actions to obtain financial resources for the Plan. (App., infra, pp. 260a-261a)

Court of Appeals-First Decision

The United States appealed the decision of the District Court. On appeal, the Court of Appeals rejected the contention of the United States that its obligation under the decree was limited to helping the Board submit funding applications — providing, as it were, a catalog to federal domestic assistance programs. (App., infra, pp. 275a-276a) Indeed, the Court of Appeals held that "¶ 15.1 imposes a substantial obligation on the government to provide available funds to the Board". (App., infra, p. 276a)

The Court of Appeals affirmed the District Court's finding that the United States had failed to obey the Consent Decree. It did so on the ground "that the United States had funds available for use by the Board but failed to provide them to the

Board". (App., infra, pp. 276a-277a) It avoided, however, deciding that the Decree was violated by the effects on the Board of policy decisions made by the Executive Branch. These policy decisions included requesting Congress to reduce or restrict the use of appropriations, replacing categorical federal assistance programs with educational block grant to states and failing to take steps to find other funds for the Board in lieu of the funds made unavailable. The Court of Appeals stated that "a significant constitutional issue may exist as to whether a finding of lack of good faith can be based upon such a series of sweeping Executive policy decisions and recommendations". (App., infra, p. 276a)

The Court of Appeals also vacated the remedial portion of the District Court's order. It remanded the case, directing the District Court to verify the amount of federal funds which were available to the Board and to afford in the first instance the United States an opportunity to fashion its own plan to remedy its violations. (App., infra, pp. 280a-281a)

The Yates Bill

After the first decision of the Court of Appeals, Congress took steps to appropriate money specifically for the Plan. At this point, however, the Executive Branch took the view that the Consent Decree did not constitutionally inhibit its activities with respect to providing or not providing desegregation assistance to the Board and affirmatively opposed measures designed specifically to provide assistance for the Plan. It lobbied against a bill sponsored by Congressman Yates which, in recognition of the United States' obligation under the Decree, would have appropriated funds for the Plan. (App., infra, pp. 139a, 144a) When this bill nonetheless passed Congress, it was vetoed by the President. The President's veto message sharply stated the constitutional issue in the case:

> This veto is not premised on a desire to protect the Federal budget. It is based upon my conviction that the Con-

> stitution and its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress. Those are exclusively the functions of the Legislative and Executive branches, and the use of judicial decrees to assume such powers raises problems of constitutional significance.

(19 Weekly Comp. Pres. Doc. 1133, Aug. 13, 1983)

Subsequently, the text of the Yates Bill was inserted as a rider to other critical appropriation legislation affecting several departments in the Executive Branch. The Executive Branch continued to lobby against the Yates Bill and also lobbied for an amendment to it which would have provided that no funds other than those appropriated by the Yates Bill could lawfully be granted by the Department to the Board. (App., infra, pp. 139a-141a, 144a) While this amendment was defeated, a version of it—the Weicker Amendment—was enacted at the time the Yates Bill became law. Thus the Board received, over the persistent opposition of the Executive Branch, a grant of $20 million for the Plan for school year 1983-84. This is the only material financial assistance which has ever been provided by the United States for the Board's Plan and it was vigorously opposed by the Executive Branch.

Plan of the United States

After the first remand of the case by the Court of Appeals, the United States continued to refuse to provide to the Board any of the fiscal year 1983 or 1984 funds which had been appropriated for desegregation purposes (save for the Yates appropriation, as to which it did not argue that it had a choice). (App., infra, pp. 144a-145a) In response to the direction of the District Court, the United States presented a document purporting to demonstrate its compliance with the Consent Decree. (Plan of the United States, filed November 10, 1983) This "plan" stated that the Board would be given a competitive

priority in the distribution of funds under any desegregation programs that the Department elected to fund, subject to criteria established by statute and other regulatory criteria as the Department chose to adopt. (*Id.* ¶3) However, the United States did not specify that, in the absence of a direct statutory mandate, there would be any such programs. Indeed, it stated that no such programs existed. (*Id.* ¶1) Moreover, it continued to assert that it maintained unrestrained discretion as to whether or not to undertake legislative activities to seek other additional funds for the Board. (*Id.* ¶5)

Remand Proceedings in the District Court

Upon remand, and after a subsequent evidentiary hearing, the District Court entered extensive further findings as to the costs of the Plan, as to the ability of the Board to provide funding for the Plan, as to the amount of funds available to the United States to provide assistance to the Board under appropriations by Congress and as to the lobbying and other legislative activities of the Executive Branch with reference to that assistance. (App., infra, p. 18a et seq.)

The District Court found that the United States had continued to violate the Consent Decree by failing to provide appropriated funds to the Board, by not "reprogramming" other funds for this purpose, and by not seeking to make other alternative funds available for the Board's plan. (App., infra, pp. 198a-199a) It also held that under these circumstances the failure of the Executive Branch to seek an appropriation of funds for the Board and its direct lobbying to make funds unavailable constituted bad faith in violation of the Consent Decree. (App., infra, pp. 196a-197a, 199a)

The District Court afforded the United States time to file a new plan, and when it failed satisfactorily to do so, entered its Remedial Order. That Order was, as it stated, designed to compel the United States to meet its obligations under the Consent Decree. (App., infra, p. 220a)

The Remedial Order required the Executive Branch to take those steps within its control to provide financial assistance to the Board. Thus it was directed immediately to provide to the Board those funds which had been appropriated by Congress for purposes which included assistance to local districts for desegregation, and which had not been committed to other grantees. (App., infra, p. 227a) The Order further required the Secretary of Education to identify all lawful steps necessary to require the State of Illinois to allocate for desegregation assistance the discretionary portion of the educational block grant funds received by the State. (App., infra, p. 230a) The Remedial Order also directed the United States to seek legislation to reappropriate unspent appropriations for use for the Plan. (App., infra, p. 229a)

In addition, the District Court ordered the United States to prepare each year an affirmative program to seek to provide up to $103 million to the Board for each year of the Plan and to take such administrative steps and make such recommendations to Congress as would be appropriate to secure that funding. (App., infra, pp. 224a, 225a, 228a)

The Remedial Order also concluded that the Executive Branch had "poisoned the well" for further Congressional action with respect to the Consent Decree by its persistent efforts to eliminate or limit the availability of funds. (App., infra, p. 225a) The District Court thus determined that the Executive Branch had placed itself in a position in which it could not prospectively comply with the Decree. (App., infra, p. 225a) Indeed, it had taken substantial steps to disable the United States—which has a specific financial obligation under the Decree — from being able to abide by its terms. To remedy this violation, the District Court declared that the United States (not simply the Executive Branch) had an unconditional obligation to provide the Board with the approximately $103 million needed for implementation of the Plan in 1984-85. (App., infra, p. 225a) The Court avoided, however, ordering

any actions by the United States to implement this particular declaration of obligation.

The Second Court of Appeals Decision

On appeal from the Remedial Order, the United States contended that the doctrine of separation of powers entitled the Executive Branch to exercise discretion so as to provide none of the appropriated money to the Board, and thus that the Consent Decree did not restrain that discretion in any way. (App., infra, p. 8a) It also argued that this doctrine, as well as the political question doctrine, prohibited the District Court from considering or entering any order as to the legislative activities of the Executive Branch. (App., infra, p. 8a, 15a) Because of what it asserted were the significant constitutional issues involved, the United States requested an *en banc* hearing:

> This [Remedial] order raises the most profound issues concerning basic separation of powers principles and the authority of the judiciary to direct the specific operations of the Executive Branch, including the Executive's relations with Congress. It also involves serious questions regarding the Secretary of Education's fund allocation authority under a grant statute intended to benefit multiple grantees and the ability of the judiciary to interfere with the Secretary's implementation of such legislation.

(Suggestion of the United States for Initial *En Banc* Consideration, filed August 23, 1984, at p. 3.)

In its decision, the Court of Appeals vacated the Remedial Order and remanded the case for a third evidentiary hearing. (App., infra, p. 17a) The Court of Appeals held that the Consent Decree did not significantly, if at all, restrain the discretion of the Executive Branch in deciding whether or not to provide the Board any specific amounts appropriated for desegregation programs. Instead, it stated that the obligation of the United States would be satisfied if the Board were merely to

> be funded on a priority basis under existing school desegregation programs, the amount of which funding is determined by program criteria and is subject to the review of the district court.

(App., infra, p. 11a) The Court of Appeals did not, however, indicate that the Secretary's power to select these criteria and apply them is in any way constrained by the United States' obligations under the Consent Decree. Thus it did not suggest that the Executive Branch needs to make any appropriated money available for desegregation activities, either for the Board alone or for the Board sharing with other school districts. In effect, the Court of Appeals held that a consent decree judgment cannot compel the Executive Branch to spend appropriated funds in a particular way.

Indeed, the Court ruled specifically that it was not a bad faith violation of the Decree for the United States to make general policy decisions as to the use of funds appropriated for purposes which include desegregation programs, even where those decisions result in no money being available for financial assistance to the Plan, and even where no good faith efforts were taken otherwise to provide financial resources for the Plan. (App., infra, p. 14a)

For example, as to the decision of the United States not to use money appropriated under Title IV to provide direct grants to the Board, or for school districts generally, the Court held:

> This policy decision applies to all school districts and does not indicate intent on the part of the United States specifically to avoid its obligation under ¶ 15.1.

(App., infra, p. 14a)

Similarly, it was held not a bad faith violation for the Secretary of Education to adopt regulations which permitted virtually none of the Discretionary Fund moneys to go to the Board for desegregation activities. Nor did it find it a bad faith violation for the Secretary not to "reprogram" appropriations for the Board's Plan. (App., infra, p. 14a)

The Court of Appeals' decision obviously derived from its concern that Article II, Section 3 of the Constitution shielded the Executive Branch from constraints on its general policy discretion as regards the Board, notwithstanding the existence of a "substantial obligation" under the Consent Decree. Indeed, it was precisely such broad policy decisions which the Court of Appeals had held presented a "significant constitutional issue" in its first decision. (App., infra, p. 276a)

Secondly, the Court of Appeals held that the Consent Decree could not under any circumstances require the Executive Branch to try to make funds available for the Plan by legislative activity, including a simple request to Congress that it appropriate funds for the Board in recognition of the Decree. Further, the Court of Appeals criticized the District Court for not having been more sensitive to comments in its first opinion in which it set forth what it considered serious constitutional obstacles to such a requirement. Thus, the Court of Appeals held that a consent decree judgment cannot constitutionally bind the Executive Branch to seek appropriations from Congress. (App., infra, p. 12a)

Finally, the Court of Appeals turned to the actions of the Executive Branch in lobbying Congress to make funds unavailable to the Board. The Court obviously was troubled by this activity, but decided that even if this had been a violation of the Decree, there was no longer any effective remedy. (App., infra, p. 16a) The only remedy, the Court held, would have been to find the executive officers of the United States in civil contempt at the time and order them to refrain from the specific, negative activities in question or to direct them to inform Congress about the Consent Decree's obligations. (App., infra, p. 15a-16a) It ruled, however, that the time for those remedial measures had passed. Thus it overturned the District Court's attempts to place the Board in the same position as if the violations had not occurred and once available funds had not been made unavailable. Once again, its concern for what it perceived to be constitutional limits on the powers of the judiciary led the Court

of Appeals to find that there could be no effective remedy for the violations of the Decree. (App., infra, pp. 15a-16a)

The various activities of the Executive Branch were plainly seen by the Court of Appeals as inconsistent with the "spirit" of the Decree, but were nonetheless thought to be within the constitutional domain of the Executive Branch and consequently beyond the constitutional power of the judiciary to remedy. Thus it concluded its opinion with this advice to the Department of Justice:

> these actions [of the United States] could be interpreted to contravene the spirit of the Decree .... Such action, while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not benefit a signatory of the stature of the United States Department of Justice.

In essence, then, the Court of Appeals held that in principal measure the Constitution prevented the provision in question in the Consent Decree, Section 15.1, from being an effective, enforceable judgment. Its opinion in this regard rendered the Decree largely advisory in nature.

Given this decision of the Court of Appeals, the United States determined to provide the Board with no direct assistance for the Plan in the current school year. The consequence has been that the Board has had to terminate programs begun in school year 1983-84 with the Yates Bill appropriations. Moreover, it has been unable to begin implementation of those programs found by the District Court to materially aid in the success of the Board's desegregation efforts.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that a Writ of Certiorari should issue in this case to review these three holdings in the decision of the Seventh Circuit:

> 1. Notwithstanding the Consent Decree's requirement that the United States "make every good faith effort to find and provide every available form of financial resources"

for the Board's desegregation Plan, the Executive Branch was held entitled to exercise discretion to provide virtually no appropriated and legally available funds for the desegregation Plan.

2. Notwithstanding the obligations of the United States under the Consent Decree, the Executive Branch was held to be constitutionally entitled to lobby in Congress against the appropriation of funds for implementation of the Board's Plan.

3. The judicial power under Article III of the Constitution was held not to include authority to order appropriate remedial measures for the past violations by the United States of the Consent Decree.

Taken together, these holdings raise fundamental constitutional issues as to the structure of our federal government and the allocation of powers and responsibilities among its coordinate branches.

Underlying the constitutional issues in this case is the principle that, in our constitutional democracy, the government, as well as the governed, is bound by the rule of law. *United States* v. *Nixon,* 418 U.S. 683 (1974). It is in large measure upon the assurance of the rule of law that the moral legitimacy and thus the authority of a democratic government depends.

The rule of law is seriously undermined, however, if the Executive Branch can successfully avoid compliance with a voluntarily undertaken and binding obligation (given additional dignity as a consent judgment) by simply changing its policies and priorities. Such a result would make the contractual agreement of the government subservient to the discretion, from time to time, exercised by its executive officers.

The rule of law is similarly undercut if, notwithstanding a consent decree, the Executive Branch can effectively lobby to prevent funds from being appropriated for the purposes of the

decree, or lobby to reduce the amount of federal money otherwise available for those purposes. Such a result would make judgments of the Judicial Branch effective and enforceable only to the extent the other branches of the government voluntarily elect to make them so. Such a result is plainly inconsistent with the rule of law; it negates the authority of the courts upon which that rule depends. As Judge Shadur stated in his preface to the Remedial Order:

> To hold the United States to nothing more than its bargain does *not* violate the separation of powers, as the United States would have it, but rather fosters the rule of law this Court has sworn to uphold in its oath to support and defend the Constitution.... Rather the Executive Branch has committed itself to a contract in the exercise of its discretion, and it is to be held responsible for that decision.

[App., infra, p. 218a]

The ability of the Judicial Branch to ensure that lawful judgments against the Executive Branch are enforced is critical to a government of laws and thus the integrity of our constitutional structure. If the Judicial Branch lacks power to enforce judgments voluntarily entered by the Executive Branch, as is the consequence of the Court of Appeals' decision, then the independent and co-equal status of the Judicial Branch is endangered. The doctrine of separation of powers surely requires that the judicial power include the power to make effective the enforcement of consent judgments binding upon the United States. See Note, EXECUTABILITY OF ARTICLE III JUDGMENTS: THE PROBLEM OF PRESIDENTIAL AND CONGRESSIONAL DISCRETION, 98 Harv. L. Rev. ____ (Forthcoming April, 1985).

The result of the Court of Appeals' decision is a form of unconstitutional *nullification,* exercised now not by the States but by the Executive Branch. It would permit that branch both to define the scope of its own obligation under a court judgment and to decide whether it may be enforced.

The decision of the Court of Appeals over which review is sought thus involves fundamental issues concerning the relationship between the branches of the federal government. These concern both the Judicial Branch's ability to enforce judgments and the Executive Branch's ability to obviate its obligations through a claim of executive discretion. Such a sharp and serious clash of the powers claimed under the Constitution for the various branches of the federal government has not previously been addressed in these circumstances by this Court. It is, accordingly, timely and appropriate for consideration by this Court.

A. The Extent to Which a Consent Decree Should be Read as Constraining Executive Discretion is a Point on Which Guidance From this Court Would be Useful.

Central to this case is whether the Consent Decree constrains the discretion of the Executive Branch to determine, within the outer ranges allowed by Congress in funding statutes and appropriation laws, whether to provide funds for the Plan. Stated another way, can the government irrespective of the Decree make any decision it wants as to whether to provide funding for the Plan? Is it possible for the United States to "make every good faith effort to find and provide all available funds" for the Plan while, at the same time, taking all the funds which can lawfully be used for that purpose and spending them on something else?

The settled meaning of the phrase of the Consent Decree, "to make every good faith effort," is that the United States is required to take all steps in its lawful authority to satisfy its obligations. *Dotson v. U.S. Dept. of Housing and Urban Development,* 731 F.2d 313 (6th Cir. 1984); *Brewster v. Dukakis,* 675 F.2d 1 (1st Cir. 1982); *State of Arizona, Etc. v. United States,* 575 F.2d 855 (Ct. Cl. 1978); *Geisser v. United States,* 513 F.2d 862 (5th Cir. 1975), *appeal after remand,* 554 F.2d 698 (5th Cir. 1977), *appeal after remand,* 627 F.2d 745

(5th Cir. 1980), *cert. denied,* 450 U.S. 1031 (1981). The United States clearly has not met this obligation.

In opposition to this plain reading of the Decree, the United States has asserted a Doctrine of Executive Discretion, which is claimed to be part of the constitutional principle of separation of powers. Under this suggested Doctrine, the Consent Decree did not, because it could not, restrain the exercise of statutory discretion by the Executive Branch. Thus, only the Executive Branch is permitted to decide the extent to which, if at all, appropriated funds should be used to provide federal financial assistance under the Decree.

In accepting the United States' assertions, the Court of Appeals appears to have been guided by its concern as to the constitutional limitations on the ability of the Judiciary to apply and enforce the plain meaning of the Decree. It held that it was not a violation of the Decree for the Secretary of Education to allocate appropriated sums in a way that virtually none of the available sums were provided to the Board for the Plan,[7] resulting in a negation of the financing provisions of the Decree.

Thus the separation of powers issue in this case is squarely presented by the decision of the Court of Appeals. The issue does not now arise because of claimed infringement of Executive Branch prerogatives by the judiciary. Rather, the conflict is posed by the Executive Branch's claim that the terms of the Decree can not constrain its exercise of discretion in the funding of the Plan. The Board, however, submits that to enforce the Consent Decree does not intrude upon the lawful discretion of the Executive Branch; that discretion is constrained by law—the obligation to obey the Decree.

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[7] The Department of Education contends that its discretion allows it to provide no money to programs which fund desegregation expenses of local school districts (or otherwise to fund the Plan). Thus the priority which it would grant applications by the Board is the right to be at the top of a list of applicants for an empty fund.

Whether a consent decree can constrain the exercise by the Executive Branch of its claimed statutory discretion has not been directly addressed by this Court. However, this is an important and timely issue which calls for review by this Court.

This constitutional question of the extent to which the judicial power, through the enforcement of consent judgments, can restrict (or should be interpreted to restrict) executive discretion is a matter of considerable currency. Many government agencies have entered into consent decrees or other agreements purporting to impose obligations upon the United States. With increasing frequency, the Executive Branch, or other parties asserting its interest, have taken the position that these obligations cannot, as a matter of law, be enforced against the United States. In recent years, several Courts of Appeals, without guidance from this Court, have examined these consent decrees or other agreements which impose constraints upon the Executive Branch. As their decisions demonstrate, the question presented by this case has far reaching ramifications, and although it needs to be, has not yet been settled by this Court.

For example, in each of these recent decisions a Court of Appeals was faced with the argument that consent decrees could not constrain the appropriate exercise of executive discretion. In *Alliance to End Repression* v. *City of Chicago,* 742 F.2d 1007 (7th Cir. 1984) (consent decree enjoined FBI from conducting investigations of persons "solely on the basis of activities protected by the First Amendment"), the decree was interpreted to allow new FBI guidelines, out of due regard for separation of powers. In *Citizens For A Better Environment* v. *Gorsuch,* 718 F.2d 1117 (D.C. Cir. 1983) *cert. denied sub nom. Union Carbide Corp.* v. *Natural Resources Defense Council, Inc.,* 52 U.S.L.W. 3861 (May 29, 1984) (consent decree requiring procedures for environmental regulations), the decree was upheld in a 2-1 decision as not improperly constraining subsequent governmental decision-making. And in *National*

Audubon Society, Inc. v. *Watt,* 678 F.2d 299, 305 n.12 (D.C. Cir. 1982) (consent decree for United States not to undertake a water development project), and *Ferrell* v. *Pierce,* 743 F.2d 454 (7th Cir. 1984) (consent decree containing substantive and procedural restraints on HUD mortgage foreclosures), and *Women's Equity Action League* v. *Bell,* 743 F.2d 42 (D.C. Cir. 1984) (consent decree and accompanying injunction against the Department of Education specifying procedures for enforcing various civil rights laws), the issue was avoided either by interpretation of the decree or for procedural reasons.

This topic is both timely and important. The decision of the Court of Appeals strikingly reduces the ability of the judiciary to enforce consent decrees against the United States. To the extent consent decrees are subject to discretionary decisions of the Executive Branch in order to make them effective or enforceable, then judgments of the courts are subject to the discretionary policy decisions of the Executive Branch. This means that the judiciary is effectively unable to enforce such judgments (making them, needless to say, unappealing as a technique of resolving litigation). Such a result makes the rule of law subservient to the discretion of the Executive Branch.

Review by this Court would also guide the states and their political subdivisions with respect to their ability to rely upon the financial assistance obligations of the United States. Such obligations are important in a broad range of governmental activities. It is increasingly the case that governmental objectives of the United States are carried out by local governments, operating with the financial assistance of the United States. As noted in *Garcia* v. *San Antonio Metro. Transit Auth.,* No. 82-1913 (U.S. Sup. Ct. February 19, 1985), in recent years a significant portion of the revenues of local governments have derived from financial arrangements with the federal government. This common technique of federal programs being administered by State and local governments, with substantial

commitments of federal funds, allows the administration of federal objectives in a decentralized fashion by the states and their political subdivisions. Such arrangements must, however, be predicated upon the binding character of federal contractual commitments.

Review by this Court is thus necessary and appropriate both to clarify the extent to which the Executive Branch's discretion may be limited by consent decrees and to provide guidance on the binding nature of the obligations of the United States to political subdivisions of the States.

B. This Court Should Decide the Important Question of Whether a Court Order can Require the Executive Branch to Make Legislative Recommendations.

This case also presents the important constitutional issue as to whether the Consent Decree can constitutionally require the Executive Branch to undertake or not oppose legislative initiatives to implement the Plan. Both the Board and the United States have acknowledged the significance of this constitutional question. As the United States has stated, the case

> raises the most profound issues concerning basic separation of powers principles and the authority of the judiciary to direct . . . the Executive's relations with Congress.

(Suggestion of the United States for Initial *En Banc* Consideration, filed August 23, 1984, at p. 3.)

Moreover, this question has been raised in recent opinions of the Courts of Appeals, but has not been decided by this Court. For example, in *Covelo Indian Community* v. *Watt*, 551 F.Supp. 366 (D.D.C. 1982), *aff'd*, No. 82-2377 (D.C. Cir. Dec. 2, 1982), *vacated as moot*, No. 82-2377 (D.C. Cir. Feb. 1, 1983), the District Court considered whether a statute requiring the Secretary of the Interior to propose legislation to Congress unconstitutionally contravened the Executive Branch's discretion in light of Article II, Section 3. It held that it did not,

and that the statute was enforceable, because the President had signed it into law and voluntarily limited executive discretion to propose or not propose legislation. *Id.* at 378 n. 9; *see also, Ferrell v. Pierce,* 743 F.2d 454, 458 (7th Cir. 1984)

Two additional reasons suggest that this issue should now be decided by this Court. First, if the Executive Branch can freely undertake legislative initiatives in its discretion which would inhibit its ability to carry out its solemn agreements, then those obligations lack substance. This hardly profits the United States. If the Executive Branch is able to take steps to limit its ability to meet the contractual obligations of the United States, then the credit-worthiness of the government is reduced.

The second reason is that the issue implicates the constitutional powers of the judiciary. If the judiciary is unable to require that the Executive Branch either seek appropriations to meet its obligations under valid judgments, or to at least not actively oppose legislation which would increase its ability to satisfy those obligations, then the powers of the judiciary in this regard are limited indeed.

Various courts have entered orders with respect to the legislative activities of state executive officers. *Delaware Valley Citizens Council Etc. v. Commonwealth of Pennsylvania,* 678 F.2d 470 (3rd Cir. 1982), *cert. denied,* 459 U.S. 969 (1982); *Brewster v. Dukakis,* 675 F.2d 1 (1st Cir. 1982). These orders presented constitutional questions regarding the proper realms of state and federal power, which may be somewhat different from the issues in this case concerning the appropriate constitutional domains of coordinate and co-equal branches of the federal government.[8] Nonetheless, these cases affirmed the Article III power of the judiciary to enforce its lawful judgments by requiring executive officers to undertake legislative recom-

[8] See, Nagel, SEPARATION OF POWERS AND THE SCOPE OF FEDERAL EQUITABLE REMEDIES, 30 Stan. L. Rev. 661, 681 et seq. (1978).

mendations. Similarily, separation of powers principles would be violated if the judicial power could not compel the Executive Branch to obey valid court orders.

C. Guidance by this Court Should be Given as to the Remedies Which May Be Provided for Actions by the Executive Branch in Violation of the Decree.

The general rule of law is that if a party violates a judicial decree, the proper remedy includes placing the harmed party in the same position in which it would have been had there been no violation. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1949). In this case, the District Court concluded that by a variety of actions, including lobbying against the Plan, the Executive Branch had violated the Decree. The Remedial Order sought to place the Board in no worse a position as a result of these violations than it would have been had the Decree not been violated. It sought to do this by, among other things, declaring that the United States had a duty to provide funding for the current school year and to adopt a plan for future years' funding of the Decree.

The Court of Appeals, however, vacated that Remedial Order. It held that the only available remedy would have been a civil contempt proceeding in which the Court could have ordered the government to stop the negative lobbying efforts and to inform Congress as to the funding obligations of the United States under the Decree. Such a proceeding was held not to be timely. In short, the Court of Appeals decided that the violations could no longer be remedied.

A critical issue is thus raised by this case as to whether there is a limitation on the powers of an Article III court to remedy violations of the Decree by steps which go beyond merely stopping the complained of activity. This question has not been decided by this Court in the context of a consent decree which binds the United States.

This issue concerning the limits of judicial remedies in such a situation is important for this Court to decide. As this Court held in *United States* v. *Nixon*, 418 U.S. 683 (1974), the executive officers of the United States, like every other citizen, must obey the law and judgments of the courts. This principle is clearly undermined if Article III courts are barred from taking effective steps to remedy violations of the Decree. Without those remedial powers there is no judicial remedy for failure of the Executive Branch to abide by judgments. This is contrary to the basic doctrine of the separation of powers. It would make the Judicial Branch's orders subservient to the discretion of the Executive Branch. If judicial orders can be entered against the Executive Branch, then effective remedies must be granted for violations of those orders. (This point is discussed in detail, with respect to this case, in a forthcoming Note. Note, EXECUTABILITY OF ARTICLE III JUDGMENTS: THE PROBLEM OF PRESIDENTIAL AND EXECUTIVE DISCRETION, 98 Harv. L. Rev. ____ (Forthcoming April, 1985)).

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2405

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 5124—Milton I. Shadur, *Judge.*

ARGUED SEPTEMBER 6, 1984—DECIDED SEPTEMBER 26, 1984

Before CUMMINGS, *Chief Judge,* WOOD and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This case comes before us for the second time on appeal from an order of the district court interpreting and enforcing a consent decree that was executed by the United States and the Board of Education of Chicago ("Board"). For the reasons set forth below, we vacate the order and remand this case for an evidentiary hearing.

I. FACTS

A. Events Prior to the First Appeal

As we explained in our first opinion, *see United States v. Board of Education of Chicago*, 717 F.2d 378 (7th Cir. 1983), this case arises from a complaint that the United States filed against the Board on September 24, 1980, charging that Chicago's public school system was racially segregated in violation of the fourteenth amendment and titles IV and VI of the Civil Rights Act of 1964. On the same day, the parties filed a previously-negotiated consent decree ("Decree") in which they agreed that the Board would develop and implement a system-wide plan to remedy the effects of past segregation on black and Hispanic students in Chicago schools. Beginning in 1981, the Board developed and implemented a desegregation plan, which was later approved by the district court. *See United States v. Board of Education of Chicago*, 554 F. Supp. 912 (N.D. Ill. 1983).

On May 31, 1983, the Board petitioned for an order directing the United States to comply with ¶ 15.1 of the Decree, which provides that

> [e]ach party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

After five days of hearings, the district court entered an order on June 30, 1983 ("1983 Order"), finding that the United States had violated ¶ 15.1 by failing to provide adequate desegregation funding, by taking no affirmative steps to find and provide such funding, and by taking affirmative steps to minimize and eliminate available sources of funding. *See United States v. Board of Education of Chicago*, 567 F. Supp. 272, 286-87 (N.D. Ill. 1983). The court held that under the plain meaning of ¶ 15.1, and also because the government actively worked to make funds unavailable, the United States was "obligated to take every affirmative step within its legal authority to find

and provide adequate financing for the plan." *Id.* at 283 (Conclusion of Law No. 7). According to the district court, this obligation required the United States to provide presently available funds, to find every available source of funds, to support specific legislative initiatives to meet the obligations of the Board, and "not [to] fail[ ] to seek appropriations that could be used for desegregation assistance to the Board." *Id.* (Conclusion of Law No. 9). The court decided that, at a minimum, the United States was to provide the portion of funding adequate for full implementation of the desegregation plan that the Board could not provide, to the extent such funding was available to or could be made available by the United States. *Id.* at 287-88. For the 1983-84 school year, the district court found that this obligation was not less than $14.6 million, and the court enjoined the United States from spending or obligating certain funds in several of the Department of Education's monetary accounts so as to insure that these funds would remain available pending the final resolution of the case.

B. The First Appeal

The United States appealed the 1983 Order, arguing that ¶ 15.1 merely required it to make a good faith effort to assist the Board in locating and applying for funds that had been earmarked by Congress for school districts undergoing desegregation. In an opinion issued on September 9, 1983, this court rejected the government's argument; we interpreted ¶ 15.1 as requiring the United States to do more than assist the Board in locating and applying for federal funds and as imposing "a substantial obligation on the government to provide available funds to the Board." *United States v. Board of Education of Chicago*, 717 F.2d at 383.[1]

[1] In reaching this interpretation, we specifically upheld both Conclusion of Law No. 8 of the 1983 Order ("the United States' promise [under ¶ 15.1] entails a serious and substantial obligation")

(Footnote continued on following page)

After considering the findings and conclusions of the district court, we refused to decide whether the United States violated ¶ 15.1 of the Decree by taking such policy-oriented steps as requesting Congress to reduce or rescind appropriations for certain programs, supporting legislation that replaced direct grant programs with federal block grants, and supporting the dismantling of the Department of Education. Instead, we held that the United States violated ¶ 15.1 by failing to provide available funds to the Board, and we specifically referred to funds from the Department of Education's Title IV account and Discretionary Fund. *Id.* & n.8.

With regard to the issue of remedies, this court found that "the district court acted with excessive dispatch in delineating specific remedies immediately after finding a violation of ¶ 15.1." *Id.* at 384. We held that "the district court should provide the Department [of Education] an opportunity to fashion its proposed remedy for past non-compliance, as well as a chance to show that it intends to comply in the future, before structuring detailed remedial action that may still be necessary." *Id.* at 385. Accordingly, we vacated all remedies, affirmed the temporary injunction against government use of certain funds so as to preserve the status quo, and remanded the case to the district court.

C. Events Subsequent to the First Appeal

1. *Congressional Activities*

On September 21, 1983, United States Representative Sydney Yates proposed the following legislation:

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[1] *continued*
and the district court's finding, expressed during the June 1983 hearings, that ¶ 15.1 embraces the grant of funds, not just technical assistance in applying for funds (Transcript of June 8, 1983, at 23). *See United States v. Board of Education of Chicago*, 717 F.2d at 381-83.

> There is hereby appropriated $20,000,000 to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans," to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the Consent Decree entered in United States District Court in the case of the United States of America against the Board of Education for the City of Chicago (80 C 5124) on September 24, 1980.

This provision ("the Yates Bill") was incorporated by Congress into H.J. Res. 368, a continuing resolution to provide temporary funding for several federal departments in fiscal year 1984. The President signed H.J. Res. 368 into law on October 1, 1983. Three days later, on October 4, United States Senator Lowell Weicker proposed an amendment to the Yates Bill ("the Weicker Amendment"), which was adopted by Congress on October 31, 1983, in the following form:

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provision of the order entered by U.S. District Court for Northern District of Illinois on June 30, 1983: Provided, that the Court's decree entered on September 24, 1980 shall remain in full force and effect.

In response to a motion that the Board submitted after the enactment of the Yates Bill, the district court ruled, on October 5, that as soon as the Secretary of Education obligated to the Board the $20 million allocated by the Yates Bill, the government would be permitted to use $15.66 million in the Department of Education accounts that remained temporarily frozen. On the same day, the United States moved the district court to vacate its 1983 Order and to declare that the $20 million allocated to the Board under the Yates Bill brought the United States into compliance with the Decree. The government renewed this motion on November 10, arguing that in light

of the Yates Bill and the Weicker Amendment, no funds beyond the appropriated $20 million were available to the Board for fiscal years 1983 and 1984. The district court denied the government's motion on November 21, 1983.

2. *Activities on Remand*

At a status hearing on October 5, 1983, the district court decided that an evidentiary hearing, which originally had been scheduled for August 10, 1983, was still needed to determine the level of funding that the Board required in order to implement its desegregation plan. *See* Transcript of October 5, 1983, at 13-14. The government contended that the hearing exceeded our remand instructions to the extent that the hearing was to establish the Board's needs and the government's obligations beyond the $20 million allocated by the Yates Bill. *See id.* at 23; United States' Pre-Trial Brief on Remand Proceeding, dated March 13, 1984. From October 1983 to March 1984, the parties submitted numerous filings in preparation for the hearing, which began on March 23, 1984, and continued for nine days. Witnesses for the Board testified about the programs that the Board had developed under its desegregation plan, the costs of these programs, and the sources of program funding. In addition, the Board presented evidence of lobbying activity undertaken by the Executive Branch with regard to the Yates Bill and the Weicker Amendment. The United States called only one witness, who discussed the use of federal Title I funds for desegregation expenses.

On June 8, 1984, the district court issued an extensive opinion ("1984 Opinion") in which it reviewed the evidence presented during the hearing. The court found from this evidence that most of the programs under the Board's desegregation plan materially aid the successful implementation of the plan and that the costs of these programs are reasonable under the circumstances. *See* 1984 Findings of Fact Nos. 210-59. Furthermore, the court found that the level of funding adequate for full implementa-

tion of the desegregation plan in the 1984-85 school year is approximately $171.631 million. 1984 Finding of Fact No. 265. Of this amount, the court determined that the Board will not be able to fund $103.858 million, despite the Board's best efforts to do so. Incorporating its 1983 ruling that ¶ 15.1 requires the United States to provide the portion of funding adequate for full implementation of the desegregation plan that the Board cannot provide, *see* 1984 Conclusions of Law Nos. 6-8, the district court decided that the "share . . . the United States is obligated to make every good faith effort to find and provide pursuant to [¶ 15.1 is $103.858 million." 1984 Conclusion of Law No. 38.

Addressing the actions of the United States since the issuance of the 1983 Order, the district court found that the government acted in bad faith by failing to provide funds to the Board, by failing to request congressional appropriations for the Board, by deciding not to reprogram available funds for use by the Board, by deciding not to provide direct grants to local educational agencies for purposes of desegregation, by attempting to make funds unavailable through congressional lobbying efforts during passage of the Yates Bill and the Weicker Amendment, by redrafting administrative regulations regarding the Secretary of Education's Discretionary Fund, and by submitting a plan for supporting the Board's desegregation efforts which, according to the court, "contained no adequate suggestions . . . for providing further funding." *See* 1984 Conclusions of Law Nos. 120-21, 123-26. The court ruled that, viewed either alone or in the circumstances of the government's bad faith, "[¶ 15.1 (as a matter of construction) requires the Executive Branch promptly to undertake some combination of . . . lobbying activities to the extent necessary to assure financing adequate for implementation of the [desegregation] [p]lan." 1984 Conclusion of Law No. 142. Such activities include requesting appropriations from Congress and opposing contrary legislative initiatives.

After allowing the United States time to respond to its opinion, the district court issued an order on August 13, 1984 ("1984 Remedial Order"), declaring that, "in light of the[ ] present circumstances. the United States has an unconditional obligation to provide Board with $103.858 million for implementation of the [desegregation] [p]lan in school year 1984-85." 1984 Remedial Order at 9. The court further ordered that, in the event the United States failed to provide the funds by August 22, 1984, the United States was permanently enjoined to take all necessary steps to obligate for the use of the Board $17 million in the 1984 Discretionary Fund and $11.775 million in the 1984 Title IV account. *Id.* at 11-12. Furthermore, the court declared that the United States must formulate an affirmative program each year to assure that up to $103.858 million is placed in an escrow account. Such a program would consist of the identification of available funds, recommendations to Congress, and lobbying activities. *Id.* at 12-15.

The government now appeals the district court's 1984 Opinion and 1984 Remedial Order, and it advances two arguments. First, the United States contends that the district court erred in interpreting ¶ 15.1 as requiring the Executive Branch to engage in legislative activity, to make up the difference between the funds necessary for implementing the desegregation plan and the funds that the Board has budgeted for this purpose, and to award Title IV funds and Discretionary Funds to the Board without regard to other grantees. Second, the government maintains that if the district court's interpretation of ¶ 15.1 is correct, the Decree is unenforceable because it violates the constitutional doctrine of separation of powers. According to the government, the Executive Branch does not have the authority to bargain away its discretion with respect to its legislative activities or to commit unlimited financial assistance to only one grantee, in contravention of the legislative purpose of the desegregation funding statutes.

II. ANALYSIS

As both parties and the district court have acknowledged, ¶ 15.1 is a unique funding provision in a consent decree that constitutes an unprecedented settlement of a school desegregation claim by the United States. Mindful of the novelty of the agreement, we carefully crafted our prior opinion so as to permit the maximum amount of flexibility and cooperation among the participants in the Decree as they labored toward a workable resolution of the dispute regarding funds for Chicago school desegregation. Our review of the events that transpired on remand convinces us that the process of dispute resolution has failed remarkably in this case.

A. Interpretation of ¶ 15.1

As we recounted above, our prior opinion interpreted ¶ 15.1 as "impos[ing] a substantial obligation on the government to provide available funds to the Board." *United States v. Board of Education of Chicago*, 717 F.2d at 383. Since the United States had misinterpreted ¶ 15.1 as merely requiring that the government assist the Board in filing applications for federal aid, and since it had failed to provide available funds to the Board, we remanded the case to the district court to give the government an opportunity to show that it intended to comply with ¶ 15.1 in the future.[2] On November 10, 1983, the government

[2] Since we noted a discrepancy in the district court's 1983 Order as to whether funds in the Title IV account and in the Discretionary Fund were available for use by the Board, we directed the district court on remand to verify the availability of these funds. *United States v. Board of Education of Chicago*, 717 F.2d at 383 n.8. In another footnote, we instructed the district court to make known its findings of fact regarding the $14.6 million that it had determined was " 'the amount of additional incremental expenditures required by Board to achieve the necessary threshold level of funding for Educational Components in predominately minority schools.' " *Id.* at 380 n.2. Both of these district court tasks

(Footnote continued on following page)

submitted the "Plan of the United States for Supporting the Desegregation Plan of the Board of Education of the City of Chicago" ("November 10 Plan"), in which it outlined its position, later rejected by the district court, that the Weicker Amendment had rendered unavailable to the Board any 1984 funds beyond the $20 million allocated by the Yates Bill.[3] However, in the November 10 Plan, the government also stated for the first time that it was prepared to give the Board priority in the distribution of desegregation funds under existing federal programs.[4] The district court gave little weight to the November 10 Plan. In its 1984 Opinion, the court stated that the plan "contained no adequate suggestions at all for remedying the United States' past Consent Decree violations or for providing further funding for the [desegregation] [p]lan." 1984 Conclusion of Law No. 123.[5]

During the most recent oral arguments before this court, counsel for the government answered questions regarding the government's system of "priority" and explained that, under this system, the Department of Education will put the Board "at the top of the list" for any

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[2] *continued*
were necessary for clarification of the record and were to be carried out within the context of our carefully expressed instruction that the district court afford the government an opportunity to propose the means by which it would attempt to comply with ¶ 15.1.

[3] The government has wisely abandoned this position in its argument to this court.

[4] Prior to its submission of the November 10 Plan, the United States had insisted that ¶ 15.1 did not entitle the Board to any priority consideration in the Department of Education's allocation of desegregation funds. *See* Memorandum in Support of the United States' Motion For a Stay Pending Appeal, filed July 19, 1983, at 29.

[5] Indeed, the district court concluded that by submitting the November 10 Plan, the government "willfully and in bad faith" violated the district court's October 28 order directing the United States to draft a plan for its compliance with ¶ 15.1.

program grants that can be applied to desegregation assistance and for which the Board is eligible. According to the government's counsel, "top of the list priority" for Title IV funds not only is a guarantee that the Board will receive its "equitable fair share" of funding under Title IV criteria, but also requires that this funding be earmarked for Chicago and be set apart from the usual block grant funding that is allocated to the regional desegregation centers serving the Midwest. Furthermore, the government's counsel explained that, with regard to the Discretionary Fund, "top of the list" priority means that if the Board were to submit a research or development project that would aid its desegregation efforts, the Board would have priority "to get what the project called for."[6]

After considering the government's oral explanation of this priority system, especially the government counsel's assurance that this priority is not available to any other school district in the country, we conclude that by guaranteeing that the Board will be funded on a priority basis under existing school desegregation programs, the amount of which funding is determined by program criteria and is subject to the review of the district court,[7] the government would comply with our interpretation of ¶ 15.1 and would fulfill its "substantial obligation to provide available funds."

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[6] We understand, from this explanation, that "top of the list priority" would preclude the situation that occurred in 1983, where the Board was denied Discretionary Funds because its two proposed projects were ranked thirteenth and twenty-eighth, and only the top ten projects received funding. *See* United States' Answers and Objections to Chicago Board of Education's Second and Third Set of Interrogatories, at 8-9 (filed with Board's Motion to Compel dated November 17, 1983).

[7] Counsel for the government acknowledged at oral argument that ¶ 15.1 binds the Secretary of Education's discretion with respect to the funds that may be used for school desegregation pursuant to congressional appropriation, and he conceded that a district court may review the Secretary's exercise of discretion in distributing those funds to the Board.

By so ruling, we reject the district court's conclusion that ¶ 15.1 mandates that the government attempt to make funds available through legislative activity so as to provide the portion of necessary funding that the Board cannot supply. The district court had reached this conclusion in its 1983 Order and had relied upon it in conducting the March 1984 hearings, which established the level of funding needed to implement the Board's desegregation plan. In its 1984 Opinion, the district court noted that since we had not rejected its 1983 conclusion regarding the government's obligation,[8] that conclusion became the law of the case. 1984 Conclusions of Law Nos. 6-8. However, the district court also observed that it was not barred from reconsidering its 1983 conclusions, and it explained that the refusal to reconsider previously decided principles on remand is "a self-imposed (hence non-binding) prudential limitation." 1984 Conclusion of Law No. 1(a). In light of the strong indication in our prior opinion that a government's attempts to remedy its noncompliance with a consent decree are to be preferred over judicially-imposed remedies, the district court would have acted with optimal prudence if it had not inferred that our silence regarding its 1983 conclusions indicated validation, *see* 1984 Conclusion of Law No. 6, and if it had freshly reassessed, prior to the submission of the November 10 Plan, its interpretation that ¶ 15.1 requires the government to engage in legislative activities to make available the necessary desegregation funding that the Board cannot supply. Such a reassessment was appropriate despite the exhaustive work already undertaken by the district court and the understandable frustration that attended the judicial monitoring of the Decree.

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[8] Given the narrow holding in our prior opinion that the government violated ¶ 15.1 by failing to provide available funds, we had no need to decide whether ¶ 15.1 obligated the government to engage in activities to make funds available in order to provide the amount needed to implement the plan.

After closely examining the extrinsic evidence surrounding the adoption of ¶ 15.1 into the Decree, we must conclude that there is inadequate support for the district court's interpretation. In the parties' stipulation regarding the negotiations leading to the adoption of ¶ 15.1, we find no indication that the parties had any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts. To the extent that the district court reads the June 19, 1980, letter from Assistant Attorney General Drew Days to the Board as indicating that the parties contemplated legislative initiatives on the part of the Executive Branch to make funds available, *see* 1984 Conclusion of Law No. 139, we find this reading to be clearly erroneous. The applicable wording in this letter tracks the language in ¶ 15.1 and does not amplify or further explain the parties' intent.

We thus remand this case for a determination of whether the Board is receiving the maximum level of funding that is available under the criteria of programs through which funds for desegregation can be disbursed. In the likely event that the Board has financial needs that are still unmet, we note that the government has admitted that it has a "duty to search among funds that Congress had indeed made . . . available." Transcript of April 5, 1984, at 1416. The best proof that the government is fulfilling this duty would be the assignment of personnel to the task of periodically reviewing federal funding programs, in the Department of Education and in other federal agencies, for unencumbered funds that may be used to advance the Board's desegregation plan.

B. Bad Faith

The district court relied on its finding of governmental bad faith, in addition to its interpretation of ¶ 15.1, as support for its 1984 remedial ruling that the United States had an unconditional obligation to provide $103.858 million to the Board for the 1984-85 school year. In light of our

holding that ¶ 15.1 does not require the government to engage in legislative activities in order to make desegregation funds available, we find that the district court erred in concluding that the government acted in bad faith by failing to request congressional appropriations for the Board, and by deciding not to reprogram funds for use by the Board.[9] Furthermore, we find erroneous the district court's determination of bad faith in the government's decision not to provide direct grants for school desegregation. This policy decision applies to all school districts and does not indicate intent on the part of the United States specifically to avoid its obligation under ¶ 15.1.[10]

In its most significant finding of bad faith, the district court described lobbying activities of the Executive Branch during the passage of the Yates Bill and the Weicker Amendment. According to the findings of the district court, *see* 1984 Findings of Fact Nos. 504-17, the Executive Branch supported a proposed addition to the Yates Bill that specifically would have made unavailable to the Board the funds that had been restrained by the district court. Although this proposed provision was not adopted by the House of Representatives, the Executive Branch continued to lobby for specific language in the Yates Bill to make the restrained funds unavailable to the Board. Even after the Yates Bill was signed into law with-

[9] As described by the district court, it is the Secretary of Education's policy to seek the approval of congressional leaders before effecting any reprograming of funds. 1984 Finding of Fact No. 427. Since this policy applies to all reprograming of funds, we cannot view it as an attempt to evade the government's obligations under the Decree.

[10] Similarly, we must overrule the district court's finding that the government's redrafting of administrative regulations limiting grants of Discretionary Funds constitutes bad faith. These regulations embody general policy decisions applicable to all grantees, and we thus cannot conclude that they were drafted specifically to avoid the government's obligations under ¶ 15.1.

out the desired language, the Executive Branch worked toward the inclusion of such language in the Weicker Amendment. On October 5, 1983, prior to the passage of the Weicker Amendment, the United States appeared before the district court and argued that very recent legislative history surrounding the yet-unenacted Weicker Amendment indicated that no funds other than the $20 million allocated by the Yates Bill were available to the Board and that, as a result, the court's 1983 Order should be dismissed. *See* Transcript of October 5, 1983, at 31-33. Although the Executive Branch continued to lobby for language in the Weicker Amendment to make funds unavailable to the Board, the amendment ultimately was enacted without this language.

The United States consistently has maintained that its legislative activities are unreviewable by the judiciary, thus prompting the Board to complain that the government's Yates-Weicker lobbying efforts were designed to force a constitutional issue upon the courts. Transcript of March 20, 1984, at 36-37. We need not reach any conclusion regarding the Yates-Weicker legislative activities, for we find that, even if these activities constituted bad faith violations of the Decree, the district court abused its discretion by ordering a $103.858 million monetary remedy against the government. Given the clear factual and procedural background of this case, it should have been apparent to the district court that if the government were compelled to pay this judgment for its bad faith, no federal desegregation money would have been available (or would have been made available) to other school districts. Such a result would have been unreasonable.

The proper remedy for any bad faith violations of the Decree in connection with the Yates-Weicker activities would have been a civil contempt citation under which the district court could have ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under

the Decree.[11] *Cf. Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (district court did not abuse discretion in holding state official in civil contempt, since "[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch"). Since the time for such a remedial measure has passed, we do not decide whether the Executive Branch's Yates-Weicker legislative activities constituted bad faith violations of the Decree.[12]

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[11] If the district court had entered such a contempt order and the government then persisted in its efforts to make funds unavailable, criminal contempt charges might have been appropriate. *See United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974) (willful and contumacious resistance to a court order is necessary to support a criminal contempt charge).

[12] As an additional ground for its finding of bad faith, the district court cited the government's submission to Congress of § 309 of the President's proposed budget of the Department of Education (Board Exhibit No. 57):

> No funds appropriated in any Act to the Department of Education for fiscal years 1984 and 1985 other than those appropriated by section 111 of Public Law 98-107 shall be available to fund the consent decree between the United States and the Board of Education of the City of Chicago: Provided, That the court's decree entered on September 24, 1980, shall remain in full force and effect and nothing in this provision shall be construed to preclude the Board of Education of the City of Chicago from receiving Department of Education funds for which it is eligible under applicable program statutes and regulations or from using such funds, as appropriate, to support activities under its desegregation plan. (Public Law 98-139. Department of Education Appropriation Act, 1984.)

1984 Conclusion of Law No. 125(h).

At the hearing concluded on March 28, 1984, counsel for the Board asked the director of the Department of Education's budget service whether § 309 constituted "negative earmarking." Transcript of March 28, 1984, at 1078. In reply, the director stated that § 309 does not preclude the Board from applying for funds under existing federal programs. *Id.* The transcript does not make clear, however, whether § 309 would specifically prevent Congress from making any funds available for the Board's desegregation

(Footnote continued on following page)

In the circumstances of this case, we deem it important to note that the actions of the Executive Branch described above and reflected in the hearings below could be interpreted to contravene the spirit of the Decree. Such actions, while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not befit a signatory of the stature of the United States Department of Justice. The Executive Branch initiated this critical litigation and bears a continuing shared and special responsibility for its eventual outcome, regardless of changes in personnel and ideology that will inevitably accompany the passage of time.

III. CONCLUSION

Accordingly, we vacate the district court's 1984 Opinion and 1984 Remedial Order, and we remand this case for proceedings consistent with part II(A) of this decision. Circuit Rule 18 shall apply on remand.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[12] *continued*
plan, other than the funds granted by the Yates Bill and the funds available under existing programs. On remand, the district court may take further evidence to determine whether § 309 would have such an effect and thus would constitute a possible bad faith violation of ¶ 15.1 of the Decree.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 80 C 5124

BOARD OF EDUCATION OF THE
CITY OF CHICAGO,
Defendant.

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff,* v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, *Defendant.*	No. 80 C 5124

This case has tended to be sidetracked by a "false conflict"[15] created by the United States: By creating an artificial limitation on funds otherwise available or potentially available to satisfy the extensive Desegregation Plan needs of Chicago's Board of Education (let alone the varying needs of other claimants of funds), the United States has sought to place the Board (and this Court) into a position as though the Board (and this Court) were choking off deserving educational programs.[16] That is simply not true. It is the United States itself that has created and is perpetuating that regrettable situation.

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[15] In the law that term is most commonly used in choice-of-law problems, reflecting the theory of analysis with which Professor David Currie is most often associated. See, e.g., *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 605 & n.2 (7th Cir. 1981).

[16] Someone has given the educators in the State of New Hampshire the idea this Court should be appealed to because the New Hampshire affiliate of the National Diffusion Network, funded by the United States Department of Education (the "Department") ran out of funds May 11, 1984. To date, 11 separate letters have come in about the loss of a program that (though this Court is not itself an educator) sounds highly worthwhile. If the United States will not be candid and acknowledge that this baby, and all the other orphans created by the United States' intransigence, must be laid at its doorstep and not that of this Court, either this Court or someone else ought to make that clear.

This Court has held,[17] and our Court of Appeals has confirmed,[18] that the United States has broken its word by refusing to keep the promise it made on the day this lawsuit was filed, Consent Decree § 15.1, ("Section 15.1"):[19]

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

In a sense the United States is not like other litigants because the concerns created by considerations such as separation of powers and sovereign immunity tend to prevent its promises from being fully enforced in precisely the same way as promises of (say) IBM or other private defendants. For that reason that Court has previously been compelled to impose a "freeze" order to avoid the risk its ability to order relief will arguably be frustrated. Because the United States has deliberately violated its original agreement to fund the Chicago Desegregation Plan, this Court has reluctantly found it necessary to prevent the distribution to other possible grantees of United States educational funds, in order to preserve access to all the dollars that would be potentially available to fund the honoring of the United States' freely-undertaken (and then freely-broken) obligation to the Board.

But as this Court has said during the course of hearings on this issue, the United States "has the key to its cell in its own

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[17] 567 F.Supp. 272 (N.D. Ill. 1983) ("Opinion II"), followed by the contemporaneously issued June 30, 1983 "Order," *id.* at 285.

[18] 717 F.2d 378 (7th Cir. 1983) ("Opinion III").

[19] More accurately, Section 15.1 is part of Part I of the Consent Decree. For convenience all references in this opinion to the Consent Decree will omit "Part I," and whenever the following Findings and Conclusions refer to "Section—" without identifying a document, the reference is to that section of Part I of the Consent Decree.

pocket."[20] It could have, in the exercise of its "every good faith effort," assured that all the needed funds would be potentially available to the Board by (1) shifting available dollars to the Board to the fullest extent possible without congressional approval or (2) going to Congress with a request to allow the shifting of dollars that were already available to the Department of Education, but required reallocation because they were not in fact going to be used for the purposes that had been the subject of the original allocation.[21] It could have done both those things if necessary. Instead the United States has chosen to pit deserving applicants for funds one against the other, and to put the issue before Congress as though the Board and this Court—rather than the United States as the breaker of its own voluntary promise—were the malefactors.

One other related point should be emphasized at the outset. Section 15.1 is part of a consent decree. Like every consent decree, it has a twofold aspect.[22] It is of course a

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[20] That phrase is one with an honored history in a somewhat different—though this time closely-related—legal context. It is customarily used to describe the situation of the party that, having violated a court order, is sentenced to confinement until he or she complies with that order. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) ("he carries the keys of his prison in his own pocket"). Of course the parallel to the present case is too obvious to require spelling out.

[21] To the extent congressional action was required to free up funds, but might not have been obtained because of competing considerations that Congress might have deemed more important despite a request from the administration, the United States as a litigant could not be faulted or held liable for a violation of Section 15.1. However the United States' conduct has poisoned the well by violating its agreement "to make every good faith effort to find and provide every available form of financial resources," and it cannot therefore excuse itself by pointing to congressional attitudes created by its own flouting of its contractual obligations.

[22] *United States v. City of Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981).

contract—and as a contract, it is enforceable to require the contracting parties to perform their voluntarily undertaken duties. Because unlike most contracts the parties have chosen to submit it for the stamp of court approval, it is also a court order—and as such, it is enforceable like any other court order, by contempt if need be.[23]

On the sorry record reflected by the matters detailed in this long opinion, a private litigant that did what the United States has done would unquestionably be held in contempt—with the potential for being subjected to a fine or imprisonment as well as to an order for civil compliance. But for the United States a contempt fine is meaningless—after all it is the public interest (and not the injured opposing party) that is vindicated by a fine, with the money going to the United States itself as surrogate for the public. Thus imposition of a fine against the United States would just transfer money from one federal pocket to the other. Similarly imprisonment of the United States as such is impossible, and any possible imprisonment of defiant ranking government officials would be unseemly at best. For those reasons voluntary adherence by the United States to its solemnly undertaken responsibilities becomes all the more important, and its deliberate flouting of those responsibilities becomes all the more unpardonable.

Now the legal rights of the litigants have to be evaluated. This opinion has not been drafted in response to the United States' conduct just referred to, but that conduct may have made the issues more clouded than would otherwise have been the case.

This Court now has before it the evidence developed in extensive hearings on remand from the Court of Appeals' decision ("Opinion III," see n.4) confirming the United States'

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[23] *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1043 (7th Cir. 1982).

violation of Section 15.1. Although the Court of Appeals did that, it also vacated the part of this Court's June 30, 1983 order (the "Order," issued contemporaneously with "Opinion II," see n.3) that had directed the United States to undertake an affirmative program to preserve the availability of funds potentially available to fulfill its obligations under the Decree. As the Court of Appeals put it (717 F.2d at 384), this Court had "acted with excessive dispatch" in doing so. This Court of course had shared the respect for separation of powers that underlay the Court of Appeals' opinion. This Court's fault, if it was one, was in a skepticism (grounded in prior conduct by the United States, not in mere surmise) as to whether the United States would in fact "fashion its proposed remedy for past noncompliance, as well as...show that it intends to comply in the future..." (717 F.2d at 385).

As the following findings of fact ("Findings") and conclusions of law ("Conclusions") will reflect, this Court's anticipatory doubts were unfortunately all too justified. Now the Department of Education has been given the opportunity mandated by the Court of Appeals, and it has failed its charge dismally. In accordance with Fed. R. Civ. P. ("Rule") 52(a), this Court sets forth the Findings and Conclusions that constitute the grounds of its action referred to in this lengthy opinion.

FINDINGS OF FACT ("Findings")

Adoption and Approval of the Desegregation Plan (the "Plan"), and the Nature of the Plan

Consent Decree Negotiations

101. Chicago's Board of Education ("Board") operates the third largest public school system in the United States. In the 1980-81 school year Board operated 634 schools, including 495 elementary schools, 66 high schools and 73 special needs schools of various types. In October of that school year Board had 458,497 students, whose racial/ethnic makeup was as follows:

White Non-Hispanic	85,292	18.6%
Black Non-Hispanic	278,726	60.8%
Hispanic	84,226	18.4%
Asian/Indian	10,253	2.2%

At the same time Board employed approximately 43,000 persons, including 29,000 members of the Chicago Teachers Union. Board is the largest employer in Chicago and the second largest in Illinois. (Stip. 101)

102. After protracted and complex negotiations, the United States and Board entered into a Consent Decree, which was filed with and approved by this Court September 24, 1980. (Stip. 102) Findings 103-04 give the background of the Consent Decree.

103. After desegregation negotiations in 1979 between the former Department of Health Education and Welfare and the former representatives of Board had proved unsuccessful, the United States Department of Justice notified former Interim Superintendent of Schools Caruso on April 21, 1980, that if further negotiations were not successful, the United States would initiate a desegregation lawsuit against Board. (GX1-27

[Government Exhibit 1, June 1983 hearing, Document 27]) Ensuing negotiating sessions between the Department of Justice and former Board representatives primarily addressed whether the parties could agree on specific racial percentages for a student assignment plan and on the specific amount and timing of the Emergency School Aid Act (ESAA) funds that the Board would receive to implement such a plan. (GX1-21,22) Board counsel indicated that if the negotiations failed and litigation commenced, Board would present counterclaims against agencies of the federal government. (GX1-39) There was no significant progress in those negotiations. (GX1-21, GX1-22) (Stip. 103)

104. During those negotiations a new Board was appointed and took office. (GX1-22) That new Board formed a Desegregation Committee (GX1-21) and indicated to the United States it would bring fresh approaches to the negotiations (*Id.*) Thereafter Board was represented by its new leadership and by new counsel. (GX1-16) Negotiations then progressed rapidly, leading to a draft agreement within a few weeks (GX1-16) and to consummation of the Consent Decree within another six weeks. (GX1-14,15) That progress resulted from an altogether different focus. Rather than seeking to negotiate the specific terms (or even somewhat more generalized terms) of a student assignment plan, the parties instead agreed to general principles that would guide subsequent development of a plan. (Consent Decree, Part I) Correspondingly with respect to funding, the parties negotiated a general principle applicable to both parties. Those negotiations concerning the general funding provision have been described in a Joint Stipulation of the parties as follows:

> At a relatively early stage in the negotiations leading to the Consent Decree, the parties discussed the question of financial support from the United States for the Board's desegregation activities. It was the Government's position

that no funding commitment specific as to form and amount could be made in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government funding, or a variety of other matters. The parties briefly discussed funding possibilities relating not only to the Department of Education (including ESAA and other programs), but also other federal agencies such as the Department of Justice, the Department of Transportaion, and the Department of Housing and Urban Development. Thereafter Mr. Ross conveyed to Mr. Howard by telephone brief descriptions (obtained by Mr. Ross from the Department of Education) of some of the types of planning and implementation activities funded in other instances. Mr. Ross also conveyed to Mr. Howard very sketchy information about grant amounts to other cities, but in general it was the position of the Department of Education that it would not disclose such information. These discussions took place approximately two months before the completion and execution of the Consent Decree. It was concluded that the matter of federal financial support would be handled by including general provisions in the Consent Decree, and Section 15.1 was drafted and incorporated into the Decree. Section 15.1 was not designed to incorporate any specific discussions between the parties on this issue, but to establish a general obligation on the part of both parties which would be interpreted and applied as appropriate in whatever future circumstances might arise.

Section 15.1 provides:

> 15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

Section 15.3 provides:

> 15.3 The parties recognize that financial cost of implementation does not excuse the failure to develop a

desegregation plan consistent with the principles set forth in §§ 2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in § 2.1.

(Stip. 104)

105. On September 24, 1980 four events occurred to make the Consent Decree fully operative:

(a) filing of a Complaint by the United States;

(b) execution and filing of the Consent Decree;

(c) after a hearing and after consideration of the Complaint, the Consent Decree and the United States' Memorandum of Law, approval by the Court of the Consent Decree and its entry by the Court; and

(d) Board's non-filing of any counterclaim against the United States.

(Stip. 105)

106. Among the general principles set forth in the Consent Decree to guide subsequent development of a desegregation plan were the following:

§ 2. *Basic Objectives*

2.1 *Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.

2.2 *Compensatory Programs in Schools Remaining Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation,

the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.

2.3 *Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.

2.4 *Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed on any racial or ethnic group.

§ 7. *Compensatory Programs in Schools Remaining Segregated.* To accomplish the objective stated in § 2.2, the plan will include specific programs for Black or Hispanic schools remaining segregated, in the following areas among others:

7.1 Remedial and compensatory educational programs.

7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that validly measure student achievement) for academic, vocational and alternative educational studies.

7.3 Pre-service and in-service instruction for administrators, principals, teachers and other school personnel.

7.4 Selection, and evaluation of the performance of, principals and supporting leadership staff.

7.5 Testing, counseling, guidance and student welfare.

7.6 Physical facilities, safety and security.

7.7 Supportive relationships between such schools and groups and institutions in the community and in government.

(Stip. 106)

107. Thus in agreeing in Section 15.1 to find and provide financial resources "adequate for implementation of the desegregation plan," the United States was agreeing to help pay for a plan that would include educational components in racially isolated schools (§2.2)[24] covering the subject matter outlined in §7, in the development of which the Board would exercise discretion (§3.1). (Stipulations 101-06)

108. Circumstances surrounding entry of the Consent Decree indicate that a joint and mutual obligation was contemplated. The Consent Decree represents the only instance in which a major urban school system has agreed, without any litigation or determination of liability issues, to develop and implement a system-wide desegregation plan under court supervision. It contemplated that because of the demographics of the Chicago school system, a substantial number of minority children would inevitably remain in racially isolated schools, requiring the extensive and expensive use of compensatory educational remedies to alleviate the effects of past segregation. In 1980 (as now) Board was faced with massive financial deficits, and the joint funding provision of the Consent Decree reflected recognition that Board's finances were such that it could not voluntarily agree to develop, or successfully to implement, an effective desegregation plan of this type unless the federal government were sharing the financial burdens. (Stipulations 101-56; June 1983 Findings and Plan/ADR data on Board finances)

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[24] As well as in magnet schools (§ 4.1.2) and desegregated schools (§§ 10.1 and 10.4).

109. Stated simply, the parties had a common and overriding goal of assuring that an effective desegregation plan was developed and implemented in Chicago. This joint purpose, with respect to financing, included a requirement that the parties provide the total mmount of funds adequate for implementation of the Plan. In Section 15.1 each party agreed to do everything possible to supply the necessary funding. (Stipulations 101-56; June 1983 Findings and Plan/ADR data on Board finances) The United States' financial commitment under Section 15.1 was the principal *quid pro quo* for Board's willingness to forego litigation and develop the Plan. In return for that commitment, the United States secured the full result it sought (and may not otherwise have achieved) without the expense and delay of complex litigation. The United States also avoided potential liability for a number of counterclaims that would have been brought against it. (Findings 103, 105)

110. With respect to "what the parties reasonably expected at the time of signing," the parties' Joint Stipulation (Government's Exhibit 2 in the June 1983 hearing) states:

> Section 15.1 was not designed to incorporate any specific discussions between the parties [on the issue of federal financial support], but to establish a general obligation on the part of both parties which would be interpreted and applied as appropriate in whatever future circumstances might arise.

All the extrinsic evidence concerning this issue does not support any notion that there was a recognized specific dollar *limitation* incorporated in Section 15.1, based on the amount of previous ESAA grants or otherwise. Indeed the Joint Stipulation reflects the parties had been discussing "funding possibilities relating not only to the Department of Education (including ESAA and other programs), but also other federal agencies such as the Department of Justice, the Department of Transportation, and

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the Department of Housing and Urban Development."[25] As this Court has determined previously, the extrinsic evidence points to an obligation to conduct a "universal search" (567 F. Supp. at 282 n.6), not a limited examination of what ESAA funding was theoretically available to Board. (Stipulations 101-06; Government Exhibits 1 and 2 in the June 1983 hearing) This does not of course mean the parties contemplated issuance of a blank check to Board by the United States. But given the circumstances of the negotiations, Board's known financial difficulties, its inability to generate funds without the approval of other governmental agencies, the known major problems (and hence major costs) of implementing a desegregation plan in a school system as large as Chicago's (and with its racial mix), and other relevant factors, the parties' reasonable expectations should certainly have embraced the potential need for the United States regularly "to find and provide" sums of the magnitude represented by Board's proof at the current hearing. Although this Court ruled in limine (prior to the current hearings) certain areas of proof by the United States would be excluded, this Court has nevertheless given full consideration to (a) the United States' offer of proof suggested by this Court as the means to complete the record and (b) Board's post-hearing response to that offer of proof. Even taking that offer of proof fully into account (rather than treating it as excluded) this Court finds nothing in the United States' proof or proposed proof persuasively refutes the reasonableness

[25] Moreover, Stipulations 101-02 and the extrinsic evidence offered by the Government, in the form of its correspondence file, reflect that in the spring of 1980, the former counsel representing a former Board were preoccupied with the potential amount of an ESAA grant that might be generated if the parties could agree on the specific parameters of a student assignment plan. However, after a new Board took office and retained new counsel, the negotiations took a sharply different direction, leading to agreement on a general funding principle not incorporating any previous specific discussions.

of the expectations referred to in this Finding. Given the parties' Joint Stipulation that Section 15.1's "general obligation ... would be interpreted and applied as appropriate in whatever future circumstances might arise," this Court finds the current circumstances make the interpretation of that obligation to embrace the Board's current request (as modified by this opinion) to be wholly appropriate for funding by the United States.

111. The Consent Decree in this case is the only instance in which the United States has entered into a desegregation settlement containing the same or substantially similar language to that in Section 15.1. (Stip. 107)

Development of Part I of the Plan, the Educational Components

112. To develop the Educational Components of the Plan, Board retained a team of independent, nationally recognized consultants. Dr. Robert L. Green was the Lead Consultant, with principal overall responsibility for the process. Dr. Green (now the President of the University of the District of Columbia) was then Dean of the College of Urban Development, Michigan State University. He was a leading national expert on desegregation plans, especially the aspect of desegregation that emphasizes educational programs to provide equal and effective education for urban and minority children. Dr. Green had participated in many desegregation cases and desegregation plans, traditionally as an expert for the plaintiffs in such litigation, and frequently on behalf of the NAACP. (Stip. 108) In addition to Dr. Green, five other education experts from outside the school system were retained on a full-time basis to work on the Educational Components, along with 24 part-time "national consultants." Professor Ronald Edmonds (who has since died) was the primary national consultant in the area of curriculum. While on the faculty of the Harvard Graduate

School of Education, Dr. Edmonds had directed the well-known major research project, *Search for Effective Schools: The Identification and Analysis of City Schools That Are Instructionally Effective for Poor Children.* Professor Edmonds had also implemented his "effective schools" design as the principal instructional officer for the New York City schools, with the title of Senior Assistant for Instruction.

113. Board's complete list of desegregation project consultants is as follows:

Robert L. Green, Ph.D., Lead Consultant
Dean, College of Urban Development
Michigan State University
East Lansing, Michigan

Staff

Nelvia M. Brady, Ph.D., Staff Director
Professional Associate
Educational Testing Service
Evanston, Illinois

Elizabeth Jill Hirt, Ph.D., Staff Associate
Research Associate
College of Urban Development
Michigan State University
East Lansing, Michigan

Judson Hixson, M.A., Staff Associate
Educational Director on Leave
Chicago Urban League
Chicago, Illinois

Jodi Martinez-Martin, Ed.D., Consultant
Teacher Education Specialist
Illinois State Office of Education
Springfield, Illinois

Frances S. Thomas, Ph.D., Consultant
Assistant Professor
College of Urban Development
Michigan State University
East Lansing, Michigan

Primary National Consultants

Curriculum: Professor Ronald Edmonds
Senior Assistant to the
Chancellor for Instruction,
NYC Public Schools

Staff Development: Dr. Cassandra Simmons
Assistant Professor and Director,
Office of Student Affairs
College of Urban Development
Michigan State University
East Lansing, Michigan

Additional Consultants and Resource Persons

Dr. Beatriz Arias
Stanford University
Stanford, CA

Ms. Norma Barnes
Norma Barnes Assoc.
Chicago, IL

Dr. Samuel Betances
Northeastern Illinois
University
Chicago, IL

Dr. Duane Brown
University of North Carolina
Chapel Hill, NC

Dr. Josue Gonzalez
Office of Education
Washington, DC

Dr. Robert J. Griffore
Michigan State University
East Lansing, MI

Dr. James Hawkins,
Superintendent
Benton Harbor Public Schools
Benton Harbor, MI

Ms. Maureen Larkin
Milwaukee Public Schools
Milwaukee, WI

Dr. Robert Crain
Johns Hopkins University
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Michigan State University
East Lansing, MI

Dr. Harold Dent
Westside Community Mental Health Center
San Francisco, CA

Dr. Edgar Epps
University of Chicago
Chicago, IL

Dr. Reynolds Farley
University of Michigan
Ann Arbor, MI

Dr. Walter Farrell
University of Wisconsin
Milwaukee, WI

Dr. Jane Mercer
University of California
Riverside, CA

Dr. Margaret Parsons
Michigan State University
East Lansing, MI

Ms. Rachel Patrick, J.D.
American Bar Association
Chicago, IL

Dr. Diana Pearce
Center for National Policy Review
Washington, D.C.

Mr. Joseph Rosen
Educational Consultant
Chicago, IL

Dr. Charles Thomas, Supt.
School District #64
North Chicago, IL

Ms. Rebecca Yarlott
Minneapolis Public Schools
Minneapolis, MN

(Stip. 109)

114. During the development of the Educational Components from November 1980 through March 1981, Board submitted monthly progress reports to the Department of Justice, as required by the Consent Decree. (Stip. 110)

115. Dr. Green submitted his Recommendations on Educational Components to Board April 3, 1981. Two weeks

later the Recommendations were adopted by Board as Part I of the Desegregation Plan: Educational Components. Part I's content is summarized by its Table of Contents:

A. Introduction

B. Educational components

1. Curriculum and Instruction—Elementary Schools
2. Curriculum and Instruction—High Schools
3. Magnet Schools
4. Vocational and Technical High schools
5. Special Education and Testing
6. Bilingual Education
7. Within-School Segregation
8. Student Discipline

C. Staff Development

D. Other Components

1. Public Participation
2. Metropolitan Initiatives
3. Faculty Desegregation and Affirmative Action
4. Evaluation
5. Monitoring

E. Appendix

(Stip. 111)

116. The following statements about Plan costs appeared at pages 17 and 19 of the "Financial Aspects" section in Part II of the Plan, adopted in April 1981:

> 1. *Cost and Funding of the Plan.* Due to the relatively short time available under the Consent Decree for development of the desegregation plan, the planning process has been addressed to the formulation of programs that would be desirable to effectuate the purposes of the Decree.

2. It has not yet been possible to determine the financial feasibility of the programs i.e., the administrative details of the programs, the exact costs associated with the various elements of the plan, the extent to which these costs can be met from existing resources or require new funding, and the availability of such new funding.

* * *

While the exact costs of the educational components are not yet known, the Board believes that the core level of funding required to make reasonably effective those educational components directed to Black and Hispanic schools remaining racially isolated is $40 million annually in fiscal years 1982 and 1983, and $20 million annually thereafter (although additional funding would be strongly desirable).

(Stip. 112)

117. Before the Consent Decree, Board's desegregation programs were administered by a staff of three persons. Shortly after the initial adoption of the Educational Components, Board created a special Office of Equal Educational Opportunity ("OEEO") to coordinate the implementation of the Plan. OEEO is presently headed by Dr. Nelvia Brady, Associate Superintendent, who was a member of Dr. Green's original desegregation planning staff. OEEO's office staff has expanded continuously since 1981 and presently comprises 53 persons, of whom eight are clerical staff, eight are teachers (who are district-assigned), 13 are school-committee representatives and 24 are teachers (7) and administrators (17) assigned to the central office. Twenty-nine of the 40 education professionals (72.5%) have their principal responsibilities in the area of implementing the Educational Components of the Plan. (Stip. 113)

Statements of the United States and this Court Relating to the Educational Components

118. On June 3, 1981 Attorney General William French Smith delivered an address before the American Law Institute. In discussing the policy of the United States as to desegregation remedies, Mr. Smith stated (at 8-9):

> All of these considerations [concerning mandatory reassignment] point to the need for more innovative and practical approaches to achieve equal educational opportunity. Mandatory busing is not an effective educational remedy, and in many cases it has also proven counterproductive. But this does not mean that desegregation should not continue or that improving the quality of public education for all our children cannot be achieved. To do so, however, we must tailor the remedy to the facts of each case in which a constitutional violation has occurred.
>
> Rather than focusing solely on the means by which discrimination has been practiced in the past, it is time we devoted more attention to remedying the resulting harms actually being suffered today. We should emphasize those remedies that actually improve the quality of education. Rather than continuing to insist in court that the only and best remedy for unconstitutional segregation is pupil reassignment through busing, the Department of Justice will henceforward propose remedies that have the best chance of both improving the quality of education in the schools and promoting desegregation.

(Stip. 114)

119. In the Response of the United States to the Desegregation Plan, filed in July 1981, the United States made the following comments about the Educational Components of the Plan:

(a) With respect to the provision of the Consent Decree concerning providing compensatory programs in schools remaining segregated, the United States said (at 5):

> This principle is based squarely on common sense and Supreme Court holdings. The method of compliance with this objective is largely within the discretion of the Board, which has the expertise in educational methods.

(b) After a brief summary of the Educational Components, the United States stated (at 22) that "the Government endorses" them.

(c) Finally, in evaluating the Educational Components, the United States said (at 32-33):

> The Educational Components have been more fully developed than the student assignment principles. The Board hired an impressive team of nationally known experts and the Plan reflects the substantial time and effort that has gone into the preparation of the Educational Components. The Board and its planners deserve a great deal of credit for the accomplishment of this task. We expect that when these new educational programs are developed in detail and implemented, they will complement the student assignment principles by enhancing the workability of voluntary desegregation techniques and that they will contribute to bringing about equality of educational opportunity in the one-race schools which remain under the final plan.

(Stip. 115)

120. On August 28, 1981 the United States and Board submitted their Joint Statement to the Court as to the development of the Plan. With respect to the Educational Components, the Joint Statement (at 5) informed the Court that

> the Board and the United States are in agreement in these general respects: ... (2) the Educational Components are an integral and necessary aspect of the Board's Plan. They are consistent with the Consent Decree and the Constitution. The United States fully endorses the Educational Components from a legal perspective, although it views the

particular educational policy choices as within the Board's discretion.

(Stip. 116)

121. On September 27, 1981 Assistant Attorney General William Bradford Reynolds delivered a speech to the Education Commission of the States, meeting in Chicago. In discussing the policy of the Department of Justice concerning desegregation remdies, Mr. Reynolds stated:

> Experience teaches us that blacks in a segregated school environment more often than not receive inferior educational attention. To the extent necessary, their facilities and curriculum must be enhanced to bring them into educational parity with the other public schools in the system. In sum, we must ensure, whatever the ultimate racial composition in the classroom, that all students attending public schools, regardless of race, color, or ethnic background, have an equal opportunity to receive an education. We are concerned, quite frankly, much less with student relocation than we are with student education and our school desegregation plans will be drawn to reflect that predominant concern.
>
> Pursuant to the Department's civil rights policies, we are overseeing the development of a desegregation plan here in Chicago that will be designed to enhance educational opportunities for all students. The public school enrollment in Chicago is approximately 61% black, 18% white, and 21% non-black minorities, mostly Hispanic. The Chicago School Board and the Justice Department recognize that there are schools in the system that will remain racially identifiable under the desegregation plan, and the Board has thus undertaken compensatory programs to enhance the quality of education provided in those schools in order to guarantee equal educational opportunity to all students in the system. To this end, the Board has developed and submitted to the Court, with our enthusiastic approval, detailed plans to enhance educational quality in the schools, and implementation of those plans began this fall.

* * *

> By concentrating our attention and resources on teachers and administrators, course offerings, incentives for learning, and other components of education quality, this Administration — with the help and cooperation of civil rights groups, state and local school authorities, and, most importantly, professional educators — can formulate desegregation plans that not only will ensure all public school students, irrespective of race, color or ethnic background, equal educational opportunity, but will do so within an educational environment free from state-enforced attendance barriers. If such a cooperative and united effort can be mounted to rid our Nation's public schools of the tragic legacy of racial discrimination, I am confident that, in time, we will be able to review that effort against the test of experience, and say with pride "it worked."

(Stip. 117; Bd. Ex. 77)

122. In school year 1981-82 Board submitted quarterly progress reports to the United States and to the Court, detailing the process of implementing the Plan, including the Educational Components. (Stip. 118)

123. In February and March 1982, following the adoption of Board's Comprehensive Student Assignment Plan, the Court entertained briefs concerning the compliance of the total Plan with both constitutional requirements and the Consent Decree. The United States Assessment of the Plan commented on the Educational Components as described in Finding 139. The Chicago Urban League's Assessment of the Plan expressed strong concern about the need to provide significant extra funding for implementation of the Educational Components in racially isolated schools:

> The provision of extra funds — and therefore resources — to schools which are to remain racially isolated is a form of compensation intended to make up in part for

> the system's failure to remedy all manifestations of segregation. This component of the Plan is extraordinarily important because the majority of the system's schools are to remain segregated under the Board's proposal ....
>
> The Chicago Urban League believes the notion of compensatory funding requires that racially isolated schools receive extra funding above and beyond what other schools may be receiving ....

The Urban League went on to express concern that Board had only committed itself to provide "Milliken II relief" to the extent that funds are available. NAACP's July 1981 memorandum on the Plan stated "we have no specific objection to the content of these programs." NAACP's March 1982 brief did not comment further on the Educational Components. (Stipulations 119, 133)

124. On January 6, 1983 this Court issued its opinion ("Opinion I," 554 F. Supp. 912) approving Board's Plan as being clearly within the broad range of constitutionally acceptable plans. With respect to the Educational Components and funding, Opinion I stated (*id.* at 926):

> *Educational Components.* As already indicated, the Educational Components of the Plan were in definitive form well before the assignment provisions that have occupied the discussion in this opinion, and those Educational Components have not drawn the same heated attention. They were approved early by the United States and found favor with the NAACP as well. To the extent they have been criticized (chiefly by the Hispanic organizations and by Designs for Change), the criticisms did not go to claimed constitutional insufficiency and are therefore not within the province of this Court's overview. Though they of course continue to form a vital part of the purposes and hoped-for impact of the Plan — the constitution guaranty is after all one of equality of *education* — no more need be said at this time.
>
> *Funding.* Desegregation, like all other aspects of affording quality education to all students in a school system, costs money. In that respect the Board is not

master of its own fate. If and to the extent other governmental bodies and agencies that control the pursestrings were to thwart the Board's ability to perform in the way its Plan contemplates and the Constitution requires, this Court would have to examine all appropriate and available remedies. There is no reason to presume at this time that any such delinquency in meeting the mandates of the Constitution, or any such resulting power confrontation, will occur.

(Stip. 120)

125. Board's 1983 Annual Desegregation Review, Part I (filed April 15, 1983) contained a section on "Financial Aspects" at 402-23, which included the following statements:

> With regard to expenditures for racially identifiable schools, a brief explanation is in order. The Board's initial commitment (as outlined in the April, 1981 Principles) was to spend $40 million a year in 1981-82 and 1982-83 and $20 million a year thereafter. As described above, spending specifically budgeted for this component of the Desegregation Plan has fallen somewhat short of this originally projected level in the first two years of implementation. As a result, the Board believes it to be appropriate to attempt to make up the difference in subsequent years. Hence, the Board believes to be desirable to spend at least $40 million in 1983-84, as opposed to the $20 million initially prescribed by the Principles. However, the funds needed to provide for this level of expenditure simply are not available from within the Board at this time.
>
> Over and above the level of expensitures for 1983-84 described above, additional resources would also be highly desirable to maximize the effectiveness of the Desegregation Plan. Such additional funding would help to strengthen and enrich the implementation of desegregation in Chicago in a variety of ways: intensified implementation and evaluation of educational components, expansion of magnet schools and programs (including metropolitan schools and scholastic academies), intensified recruitment efforts, improvement in vocational, technical and special

educational programs, initiation of interdistrict transfer programs, to name only a few.

Resources. The resources necessary to fund desegregation implementation at the levels set forth above unfortunately are not available at this time from within the Board. The Board, for its part, is committed to appropriations for 1983-84 of at least $57 million — a continuation of the amounts it budgeted for the current school year. To the extent additional moneys are made available, the Board will spend them to bring the aggregate levels of expenditures for racially identifiable schools up to $40 million and to further maximize optimum implementation of this and other aspects of student desegregation.

* * *

Thus, at this time precise estimates of the Board's financial condition for future years are slightly premature. However, it may be fairly stated that for 1983-84 the Board faces budget problems of an extremely serious magnitude. Preliminary projections suggest it is facing a budget deficit in the range of $200 million ....

In any event the Board believes that, in the first instance, the obligation to provide these additional resources for the substantial expenditures which full and complete implementation of the Plan entails lies with the federal and state governments.

* * *

On April 13, 1983, the Board adopted a resolution directing its counsel to initiate litigation against the State of Illinois and the United States seeking contribution for the cost of implementing the Desegregation Plan. The Board expects that the initiation of these actions will be forthcoming.

(Stip. 121)

126. Board's statements as to the desired expenditure of at least $40 million on the Educational Components in racially isolated schools and on the desired expenditure of additional amounts for these purposes, including the statements described in Findings 116 and 125, do not reflect any determination by

Board either that the expenditure of $40 million would be "adequate" for that aspect of the Plan (in terms of Section 15.1) or that the expenditure of additional amounts for that aspect of the Plan would not materially aid its success or would not be necessary for its full implementation. (Stipulations 101-21; Parts I, II and III of the Plan)

127. In August 1983 Board filed Part II of its 1983 Annual Desegregation Review, a 416 page document that reported in detail on the implementation of the Educational Components ("ADR II"). After the filing of ADR II this Court provided the United States and the *amici curiae* the opportunity to file comments. Neither the United States nor any of the *amici* filed comments with the Court. (Stip. 122)

128. As the preceding review of the record reflects, the United States (a) strongly supported (indeed, insisted upon the inclusion of) Board's Educational Components as the developmental process moved from the Consent Decree principles to the April 1981 Educational Components Plan to approval by this Court and (b) raised no subsequent objection as Board proceeded to add programmatic details to those initial documents. Only when called upon to fulfill its financial responsibility did the United States begin to renege on its approval. (Stips. 101-22, 133)

Overview of the Student Assignment Plan

129. Under the Consent Decree Board agreed to adopt a system-wide desegregation plan with two basic objectives. Section 2.1 called for creating the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago. As already described, the second objective was to provide educational and related programs for schools that remained racially isolated. (Stip. 123)

130. In January 1982 Board adopted its Comprehensive Student Assignment Plan, which divides all schools in the school system into four broad categories. First of those categories is that of the residentially integrated school (defined as one whose enrollment includes at least 30% white children and 30% minority children, derived principally from residential or other natural attendance patterns). Two basic types of schools come within that category: (a) stably integrated and (b) integrated but with potential for change. There is a third type of school identified in the Plan: currently integrated, but with an enrollment of white children projected to decline below 30%.[26] As of October 1981 those three types of schools emcompassed 67 schools with an enrollment of 52,067 students[27] (Stip. 124)

131. Next the Plan considers the category of the desegregated school: one whose enrollment includes at least 30% white children and 30% minority children, and which has been established primarily by student assignment techniques under the Plan. That category includes both (a) schools that have previously achieved stably desegregated status through the implementation of various student assignment measures (as of 1981, 42 schools with 20,329 students) and (b) schools that in 1981 were yet to achieve desegregated status, through previously existing and newly adopted student assignment techniques (in 1981, 33 schools with 17,541 students). Such techniques include voluntary transfer programs and magnet and magnet-type programs within schools. (Stip. 125)

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[26] Two other sub-categories are also identified: (a) stable mixed schools having a small but relatively constant enrollment of white children and (b) schools whose enrollment composition is currently racially mixed but is projected to become racially identifiable.

[27] All the enrollment data in Findings 130 through 134 excludes pre-school and kindergarten children.

132. In addition the Plan describes various magnet-type schools, which are established primarily in minority communities and are designed to promote desegregation by special educational offerings and programs. Each such school has a target enrollment composition, generally 15-35% white, 65-85% minority. In 1981 such schools included 41 magnet schools, scholastic academies and metropolitan high schools, enrolling 28,824 students. (Stip. 126)

133. Finally the Plan also considers schools projected to remain racially identifiable (with an enrollment of greater than 70% minority children, less than 30% white children). In 1981 there were 354 such schools, enrolling 275,794 students. After describing why those schools cannot practicably be desegregated, the Plan describes the compensatory educational arrangements that will be provided for at those schools and the various voluntary transfer arrangements in which students enrolled at those schools may participate. (Stip. 127)

134. This table summarizes the school types identified in the Plan, and the number and enrollment of the schools:

	Number	1981 Enr.[28]
Integrated Schools:		
Stably integrated	42	31,791
Integrated schools stable but projected to become mixed	11	7,697
Integrated schools with potential for change	14	12,579
Subtotal	67	52,067
Schools Desegregated and To Be Desegregated:		
Schools presently desegregated	42	20,269
Schools to be desegregated	33	17,541
Magnet schools	29	16,765
Scholastic Academies - 1982	6	2,406
Metropolitan High Schools - 1982	6	9,653
Subtotal	116	66,634
Predominantly Minority Schools:		
Stable mixed (15-29% white)	14	11,481
Mixed with potential for racial change	20	14,695
Schools more than 85% minority	320	249,618
Subtotal	354	275,794
Special Needs/Special Admissions:		
Physically handicapped, apprentice, adult education, bilingual centers, juvenile detention and pregnant students	43	9,173
Total	580	403,668

(Stip. 128)

[28] All enrollments excluding 39,221 preschool and kindergarten children. Twenty-five child-parent centers omitted.

135. Two mandatory requirements were established by the Plan. One was that every school achieve by October 1983 a minority enrollment of at least 30%. Under the other, by October 1983 the school system as a whole had to achieve a minimum total enrollment in all integrated and desegregated schools (including magnet schools). This latter requirement is generally referred to as the "desegregation index" requirement. (Stip. 129)

136. Additionally the Plan sets forth other student assignment provisions to be applied throughout the school system to provide and maintain the maximum practicable desegregation and to ensure that the Plan will not initiate or authorize any segregative actions. Among such provisions are those concerning school closings, boundary adjustments and within-school segregation. (Stip. 130)

137. In a separate volume, the Student Assignment Plan contains school-by-school analyses for each school in the system. Those analyses describe in summary terms the work and consideration that went into developing a desegregation strategy for each school. They also provide a detailed statement as to why it is not practicable to desegregate a large number of schools remaining racially identifiable. (Stip. 131)

138. Detailed evaluation of the student assignment component of the Plan, including analysis of enrollment composition and prescription of specific actions for over 200 individual schools, is undertaken every year. Each such evaluation is reported on in an Annual Desegregation Re- view ("ADR"). (Stip. 132)

139. After the adoption of the Comprehensive Student Assignment Plan in January 1982, the United States filed its 33-page Assessment of the Plan. It explained the United States' belief that the Plan is constitutional and consistent with the Consent Decree. In conclusion the United States stated:

> We believe that, for the reasons stated in these comments, once the plan has been thoroughly implemented and the Educational Components completed, the Board will have: (a) provided a system-wide remedy with compensatory programs at remaining segregated schools, (b) established the greatest practicable number of stably desegregated schools, (c) insured that all racial and ethnic groups participate and (d) distributed the benefits and burdens of the plan on a fair basis.

(Stip. 133)

140. In Opinion I (554 F. Supp. 914-15) this Court incorporated the Board's summary of its extensive and effective activities in the 18 months from the entry of the Consent Decree to the adoption of Part III of the Desegregation Plan. This Court further noted it had deferred ruling on the Plan for several months, so that the promises of the Plan could be "test[ed] in the crucible of reality." In light of the fall 1982 implementation results, this Court found "nothing in the execution of the Plan has been shown to disprove the premises on which it was designed" (*id.* at 915). Finally, having reviewed the Plan in detail, this Court approved it as being "clearly within the broad range of constitutionally acceptable plans" (*id.* at 928). (Stip. 134)

141. In April 1983 the Board's Annual Desegregation Review (Part I, Student Assignment) ("ADR I") showed that (a) implementation of the Plan during school year 1982-83 was a considerable success and (b) to a very significant degree its projections of student assignment outcomes had been realized. ADR I was also candid in its assessment of shortcomings and in adopting measures to address them. (Stip. 135)

142. In its May 1983 response to ADR I, the United States favorably evaluated the Board's substantive implementation process (at 1-2, 4-5):

> The Chicago School Board's April 19, 1983, filing on its first Annual Desegregation Review is an extremely well-

conceived document and will be a valuable guide for assessing the Board's compliance with the underlying principles established by the Consent Decree and the Court in this case. Like the desegregation plan itself, this document reflects extensive thought, preparation and effort at implementation in a context that is so complex that it often seems incapable of clear description. The review document makes a significant contribution to the clarification, for all involved, of what this plan has meant for the Chicago public schools.

Our first comment is on the review process itself. We know of no other school board, large or small, that has made as comprehensive, detailed and careful examination of what it is doing to implement a desegregation plan.

* * *

We think that the overall plan implementation process has been excellent and that the Board has applied it in good faith at each school .... Should the Board fail to take the remedial steps recommended in the review or otherwise fail to take the steps necessary to fulfill the plan's promise, the plan's present constitutional sufficiency would suffer. At this point, we have no reason even to suspect that this is a possibility.

(Stip. 135)

143. As Finding 135 reflects, the mandatory requirements of the Student Assignment Plan became applicable as of October 1983. While the formal evaluation of the results of the Plan in the 1983-84 school year is not yet due to be filed, Board filed a Report Concerning Preliminary Fall 1983 Enrollment Data on November 2, 1983, informing this Court that the requirement of 30% minimum minority enrollment in all schools had been met. (Stip. 137)

144. For comparison with Finding 134, the following table shows fall 1983 data as to the number and total enrollment of the various school types identified in the Plan. Those data are comparable with Finding 134, but it should be noted that there has been some recategorization of schools to reflect the experience of the past two years. As in Finding 134, the figures

exclude kindergarten students; therefore the total enrollment shown is for grades 1-12, 41,260 students less than systemwide enrollment.

	Number	1983 Enr.[29]
Integrated Schools:		
Stably integrated	47	36,569
Integrated schools stable but projected to become mixed	4	2,009
Integrated schools with potential for change	4	5,033
Subtotal	55	43,611
Schools Desegregated and To Be Desegregated:		
Schools presently desegregated	77	42,382
Schools to be desegregated	0	
Magnet schools	33	19,155
Scholastic Academies	5	3,092
Metropolitan High Schools	6	10,302
Subtotal	121	74,931
Predominantly Minority Schools:		
Stable mixed (15-29% white)	17	12,683
Mixed with potential for racial change	10	8,065
Schools more than 85% minority	334	248,161
Subtotal	361	268,909
Special Needs/Special Admissions:		
Physically handicapped, apprentice, adult education, bilingual centers, juvenile detention and pregnant students	43	5,331
Total	580	392,782

(Stip. 138)

[29] All enrollments excluding 39,221 preschool and kindergarten children. Twenty-five child-parent centers omitted.

Demographics of the City of Chicago and the Chicago Public Schools

145. Extensive demographic information is presented in both the Comprehensive Student Assignment Plan (at 8-39) and in 1983 ADR I (at 20-23). (Stip. 139)

146. Racial composition of the total population of the City of Chicago from 1940 to 1980 is summarized in the following table:

Year	White No.	%	Non-White No.	%	Total No.
1940	3,115,000	91.7	282,000	8.3	3,397,000
1970	2,208,000	65.6	1,159,000	34.4	3,368,000
1980	1,311,000	43.7	1,694,000	56.3	3,005,000

(Stip. 140)

147. Racial/ethnic composition of the Chicago public schools from 1970 through 1983 is presented in the following table:

Chicago Public Schools

Racial/Ethnic Composition 1970-1983

See chart in Supplemental Appendix, p. S-1

(Stip. 141)

148. One principal reason the proportion of minorities is higher among public school students than among the overall city population is that a large number of children (more than half of whom are white) attend nonpublic schools in Chicago, especially the Catholic parochial schools. Their metropolitan-area enrollment of nearly 190,000 students makes the Catholic schools the fifth largest school system of any kind in the United

States. Within Chicago the Catholic schools as of 1982 had 226 schools enrolling 114,299 students, of whom 56% were white, 25% black, 16% Hispanic and 3% Asian. (Stip. 142)

149. Total membership in the Chicago public schools has leveled off this year after 15 years of decline that were often characterized by very substantial drops. This year's decline in total membership is only about 1800 (0.4%), compared with almost 19,000 (3.9%) in 1980. As a historic matter, enrollment was 372,278 in 1952. Student membership increased quite dramatically in the 1950s and the 1960s, reaching a peak of 580,292 in 1969. Since then enrollment has declined generally at the rate of 2-4% per year, with the greatest declines between 1977-81 (over 15,000 students, or 3-4%, per year). In 1982 the decline was 1.6% (7046 students), as contrasted with the slight drop in 1983. (Stip. 143)

150. Enrollment of white students (now 67,829 or 15.6% systemwide) has declined at a significantly slower rate since adoption of the Plan. From 1977-81 white enrollment declined at 9-11% per year (or 10,000-12,000 students). In 1982 white enrollment declined 6% (4,941 students) and in 1983, 5% (3,342 students). (Stip. 144)

151. Black students now number 263,163 (60.6% systemwide). As with total enrollment and with white students, 1983 decline in black enrollment of 1,367 students (0.5%) is significantly lower than declines of 2-4% in the preceding five years. (Stip. 145)

152. In contrast to white and black enrollment, Hispanic enrollment in the school system has been increasing steadily since 1970, at the rate of 3-6% annually. Hispanic students now number 91,763 (21.2% systemwide). (Stip. 146)

153. Board's demographers believe the enrollment changes summarized in Findings 149-52 can be attributed to the following factors:

Demographics: continued effects of changes in the number of births, in- and out-migration, and the patterns of student distribution among grades.

Economics: recent high unemployment rates which have curtailed ability to pay tuition for private schools and reduced job opportunities for potential high school dropouts; high mortgage rates which have slowed down the housing market and, in turn, the rate of suburbanization.

Educational Initiatives: smooth implementation of the desegregation plan without busing; development of a variety of program options and specialty schools designed to attract students; an active recruitment program; increases in achievement scores; and greater parental and community involvement through programs such as report card pick-up and Adopt-A-School.

(Stip. 147)

154. During the past two years of relatively stable enrollments, an important factor contributing to changes is the transfer rate between public and nonpublic schools. As the following table reflects, the Chicago public schools have been gaining more students and losing fewer since 1980:

Student Transfers To/From Nonpublic Schools in Chicago

	1980	1981	1982
Transfers from Nonpublic Schools in Chicago	6,084	7,041	7,934
Transfers to Nonpublic Schools in Chicago	12,919	11,648	10,177
Net Loss	6,835	4,607	2,243
Total Membership	458,497	442,889	435,843
Percentage Net Loss	1.5%	1.0%	0.5%

(Stip. 148)

155. It appears the recent trend of enrollment decline in the Chicago public schools has ended this year. Gradual increases can be expected to begin next year, if the general demographic trends (particularly migration and transfer rates) experienced in the recent past continue in the years to come. Such a development would point to increased demand for teachers and school facilities. As to racial/ethnic composition, the school system is expected to increase in minority enrollment. This is partly because of the greater proportion of whites in the upper grades, combined with continued outflow, and the higher birth rates for minority groups (particularly Hispanics) coupled with continued immigration of Hispanics.

(Stip. 149)

156. Racial/ethnic composition of the elementary and secondary levels of the school system as of October 1983 is detailed in the first table following Finding 157. These data are briefly summarized as follows:

See tables, Supplemental Appendix p. S-2 and S-3.

(Stip. 150)

157. Racial/ethnic composition of the Chicago public schools by grades is detailed in the second table following this Finding. In brief summary the data reflect higher proportions of minority students in the lower grades. For example, minority enrollment is 75-80% in grades 11 and 12, and 85-86% in first grade and kindergarten. (Stip. 151)

See table, Supplemental Appendix p. S-4.

158. There are presently 407 schools with enrollments more than 70% black and/or Hispanic (excluding magnet schools):

% Minority	No. of Schools	Total Enrollment
70-80%	14	7,616
80-90%	37	20,452
90-95%	33	31,189
95-99%	31	28,348
99%+	292	215,554
	407	303,159

Those students are 69.8% of the systemwide enrollment. There are 275,091 students (69.4% of systemwide enrollment) attending schools more than 90% minority. (Stip. 152)

159. Schools with more than 70% black and/or Hispanic enrollment will increase in number in coming years, as a result of the demographic and transfer trends described in Findings 145-57. (Stip. 153)

160. In schools with enrollments more than 90% black and/or Hispanic, 1983-84 total kindergarten and pre-school enrollment is as follows:

% Minority	K & Pre-school Enrollment
90-95%	3,130
95-99%	3,978
99%+	22,733
	29,841

Such enrollment is projected to be at least as great in school year 1984-85, and will probably increase. Kindergarten students represent approximately two thirds of this total, or 20,000 students. (Stip. 154)

161. In schools with more than 90% black and/or Hispanic enrollment, the number of black and Hispanic children in grades 1-3 in school year 1983-84 is approximately as follows:

Grade	Black	Hispanic	Total
1	16,913	4,361	21,274
Pre-2	2,369	710	3,079
2	16,497	4,310	20,807
3	15,733	4,002	19,735
Total	51,512	13,383	64,895

Those numbers are projected to be at least as great in school year 1984-85, and will probably increase. (Stip. 155)

Propriety and Cost of Programs Proposed for Adequate Implementation of the Plan

201. Dr. Nelvia Brady is a qualified expert as to the effects of racial segregation on minority children; the nature and types of desegregation programs that are capable of eliminating or alleviating those effects; the design, development and implementation of the Plan; and the ability of federal Chapter 1 and State Title I eligible programs to alleviate the effects of past segregation. She is presently Associate Superintendent, OEEO, and has primary responsibility for implementation of the Plan. (Brady testimony)

202. Dr. Brady was one of the experts with principal responsibility for drafting the Educational Components of the Plan. (Brady testimony)

203. In April 1981 Board adopted the Recommendations on Educational Components (prepared by its nationally known expert, Dr. Green). Those Recommendations accurately explain the justifications for educational components:

> The rationale for this approach lies in the notion that the desegregation of a school system involves much more

than the reassignment of students. Too often, desegregation planners have seemed to be concerned only with the movement of students in order to achieve some specified distribution by race and ethnic background. This preoccupation has been matched by a public concern with "busing," as though the question of how a student reached school was more important than what the student received from the school.

Research covering the last thirty years indicates that the physical separation of students by race and ethnic background is almost always accompanied by disparities in the educational services provided to minority and nonminority students, and by significant gaps in the achievement of minority students, particularly those from low-income backgrounds. Stated simply, segregation creates educational deprivation for minority children black, Hispanic, Asian, and Native American — and also results in attitudinal deprivation for all students.

A desegregation plan must, therefore, address not only the physical desegregation of schools but also the educational desegregation of individual students. The educational disadvantages resulting from past racial/ethnic isolation — or any such isolation that may have to continue — must be remedied. The overriding goal of this plan is to address minority students' educational needs arising from the segregation of the public schools. The method being proposed is through improving achievement in all schools, with particular emphasis on those schools with the greatest needs and attended by children who have been the most disadvantaged.

(Brady testimony)

204. Dr. Brady described elements of the Plan that have been implemented to date and provided an evaluation of Board's efforts in this area. In general that portion of her testimony addressed both the student assignment aspects of the Plan and the elements of the educational components of the Plan as to which implementation has already been initiated. She also discussed the elements Board intends to implement in school year 1984-85 if there is sufficient available funding.

More specific testimony as to the implementation status of the Curriculum, Bilingual and Vocational/Technical Education components was provided by Drs. Gerald Heing, Josue Gonzales, and Philip Viso, respectively (Testimony of Brady, Heing, Gonzales and Viso)

205. Dr. Brady showed Board has experienced significant successes in its implementation efforts to date. Her testimony was supported by evaluations performed during the last two years at the 45 racially isolated targeted elementary schools that were first included in the Chicago Effective Schools Project. (Brady testimony)

206. Dr. Brady's testimony described the process by which the Plan was designed and developed. She related how past segregation in the Chicago public schools has affected the basic learning skills achievement levels of children, particularly minority children now attending, or who in the future will attend, racially identifiable minority schools. She explained each component of the Plan is (a) carefully designed to alleviate the effects of past segregation and (b) will substantially further implementation of a successful desegregation plan. She further explained that, given the historic backdrop and the demographics of Chicago, full and successful implementation of the Educational Components is crucial to the success of the Plan. (Brady testimony)

207. In substantial part the Educational Components are intended to eliminate or alleviate the effects of past racial segregation on minority children who will remain in racially identifiable schools under the Student Assignment Plan and who will attend such racially identifiable schools in the future. In pursuit of this goal, the Plan also addresses the need for systemic and institutional changes in the manner in which the school system provides educational services. (Brady testimony)

208. Minority children now attending Chicago public schools suffer, or have been affected by, one or more of the following effects of racial segregation:

(a) reading, math and communication skills one grade or more below the students' current grade levels;

(b) tests and testing procedures with racial, ethnic, or cultural bias;

(c) unequal treatment of minority children in racially identifiable schools by teachers and administrative staff;

(d) less access for minority children to vocational and technical educational programs;

(e) curricula colored by racial, ethnic or cultural bias;

(f) the psychological pressures of attending racially identifiable schools and the resulting loss of self-esteem;

(g) codes governing student conduct that are affected by racial, ethnic or cultural bias;

(h) speech habits that vary from those used in an environment in which they must ultimately compete;

(i) lack of interpersonal learning experiences derived from open association with other students of varying races, cultures and religions;

(j) lack of access to majority culture, which is reflected in the standards that determine success in society.

(Stip. 155, Brady testimony.)

209. This broad spectrum of inequalities and injuries resulting from racial isolation cannot be remedied only by student assignment, even where student assignment is available. It requires other remedies, particularly compensatory educa-

tional remedies, where student assignment is unavailable. (Brady testimony)

210. OEEO, in conjunction with other Board departments and units, developed the programs described in Board Ex. 28. OEEO was primarily responsible for developing the following program elements:

a. Effective Schools Project
b. Racially Isolated Schools
c. Magnet Schools
d. Trainers Institute
e. Management Information
f. Affirmative Action
g. Equity Compliance
h. Staff Development
i. Within School Segregation

Board's Department of Pupil Personnel Services and Special Education was primarily responsible for developing the Special Education and Discipline program elements. Its Department of Vocational and Technical Education was primarily responsible for developing the Vocational and Technical Education programs elements. Its Department of Curriculum and Instruction was primarily responsible for developing the curriculum program elements. Its Department of International and Multicultural Education was primarily responsible for developing the bilingual program. Its Department of Research and Evaluation was primarily responsible for developing the program to evaluate the results of Plan implementation. (Brady, Viso, Heing and Gonzales testimony)

211. Board's original version of proposed Board Trial Ex. 28 was provided to the United States on or about September 16, 1983. (Response to Board's Second Set of Requests to Admit, No. 28)

212. Dr. Brady reviewed each program in Board Ex. 28 and testified each program was designed to implement the Educational Components of the Plan, would significantly alleviate the effects of past segregation and was necessary for a successful desegregation effort in Chicago. She described how each program element was developed, how each works or is expected to work and how each relates to one or more of the Plan's Educational Components. She testified each of those program elements materially aids successful implementation of the Plan by alleviating the effects of past segregation. Her testimony also explained how the cost of each element was calculated. This Court has considered in detail (a) Board's proof on an item-by-item basis (including all submitted Exhibits and this Court's own notes on all the testimony made during the course of the hearing, supplemented where necessary by review of the transcript), (b) the United States' specific objections (as articulated at the hearing and as filed in a post-hearing memorandum April 20, 1984) and (c) Board's detailed post-hearing response filed April 30. In so doing this Court has applied the standards taught by the *Liddell* and *Arthur* cases discussed in the Conclusions. It has paid close attention to drawing the line between programs that will materially aid successful implementation of the Plan and those that have a more generalized primary focus of improving the quality of general education in the school system. Except to the extent reflected by these Findings and Conclusions, Board's last response to the United States' argument as to "specific failures of proof contained in the Board's presentation" is wholly persuasive, and the objections of the United States are therefore rejected.

213. In school years 1981-82 and 1982-83, implementation of the Plan's Educational Components included the introduction and implementation of Effective Schools Project ("ESP") programs at 45 specially targeted racially identifiable schools and the implementation of certain elements of the ESP

program at other racially identifiable schools. The 45 specially targeted schools are:

District	School
3	Schiller
4	Hay Branch
5	Lowell
	Morton
	Stowe
6	Anderson
	Diego
	LaFayette
	Moos
	Von Humboldt
	Yates
7	Beidler
	Douglass Middle
	Goldblatt
	Melody
	Tilton
8	Chalmers
	Komensky
9	Dett
	Dodge
	Herbert
	Medill Primary
	Smyth
	Suder
10	Frazier
	Henson
	Lawndale
11	Donoghue
	Douglas
	Einstein
	Williams

District	School
12	Fulton Branch
	Sherman
13	Beethoven
	Burke
	Colman
	Farren
	Hartigan
	McCorkle
	Parkman
14	Oakenwald South
	Robinson Branch
	Wadsworth
15	Raster
	Raster Branch

(ADR II; Brady testimony; Board Ex. 112)

214. Those target schools were selected from among all racially identifiable schools in the system on the basis of a comparative need evaluation. First, all racially identifiable schools were ranked lowest to highest based on achievement test scores in reading and math, with a double weighting for reading, over a two-year period. In addition, attendance and student mobility statistics and the extent of racial isolation were taken into consideration in the ranking process. That process produced a ranked list of the lowest-achieving most racially identifiable schools in the system, and the 45 lowest on the list were chosen as target schools. (Brady testimony)

215. For school year 1983-84 the complete ESP program was continued at the 45 target schools and implemented for the first time at the 62 additional racially identifiable schools (including 7 educational vocational guidance centers) listed below:

District	School
2	Gale Academy
	Marti Bilingual Education Center
3	Byrd Academy
	Jenner Elementary
	Mulligan Elementary
4	Howe Elementary
5	Avondale Elementary
	Norton E.V.G.C.
	Nobel Elementary
	Piccolo Middle School
	Ryerson Elementary
	L. Ward Elementary
	Wright Elementary
6	Anderson E.V.G.C.
	Chopin Elementary
	Koscuiszko Elementary
	Otis Elementary
7	M. Clark Middle School
	DePriest Elementary
	Ericson Elementary
	Roetgen E.V.G.C.
	Spencer Elementary
8	Bethune Elementary
	Hammond Elementary
	Howland Elementary
	Lathrop Elementary
	Pope Elementary
	Spry Elementary
9	Brown Elementary
	Grant Elementary
	Irving Elementary
	McKinley E.V.G.C.
	Medill Intermediate &
	Upper Grades

District	School
10	Gregory Elementary
	C. Hughes Elementary
	McCormick Elementary
	Webster Elementary
11	Abbott Elementary
	Drake E.V.G.C.
	Mayo Elementary
12	Copernicus Elementary
	Fulton Elementary
13	Dyett Middle
	Hope Community Academy
	Ross Elementary
	Terrell Elementary
14	Dulles Elementary
	Mollison Elementary
	Price Elementary
	Woodson North Elementary
15	O'Toole Elementary
16	Bass Elementary
	Goethals E.V.G.C.
	Kershaw Elementary
	Low Upper Cycle
17	Bryn Mawr Elementary
	Revere Elementary
19	J.N. Thorp Elementary
	J.N. Thorp E.V.G.C.
20	Aldridge Elementary
	Carver Middle School
	Kohn Elementary

(Board Exs. 30 and 112; Brady testimony)

216. Those 62 additional schools chosen to participate in the full ESP program in school year 1983-84 were selected through the same means initially used to select the 45 target schools. Using the formula stated in Finding 214, all racially identifiable schools in the system were again listed in order in the fall of 1983, with the lowest-achieving most racially identifiable school ranked first. After the 45 targeted schools already participating in the ESP programs were deleted from the list (as automatic continuing participants), the 62 lowest ranking schools remaining on the list were selected for implementation of the full ESP program in school year 1983-84. (Brady testimony)

217. Implementation of the full ESP program at those 62 schools is possible only because of the $20 million appropriation to Board pursuant to the Yates Bill (discussed in later Findings), which provided only a one-year appropriation of funds. Board currently lacks the financial resources to continue the ESP programs at those 62 schools in school year 1984-85. (Brady and Glasper testimony)

218. Board Exs. 28, 31, 32, 110 and 117 accurately describe the full ESP programs implemented at 107 racially identifiable Chicago public schools. Those ESP programs were implemented in school year 1983-84 in accordance with the Plan set forth in Board Ex. 30. (Brady testimony)

219. Implementation of the full ESP program at the 107 schools in school year 1983-84 has not involved duplication of other desegregation programs previously placed in those schools, which Board is continuing to implement. Implementation of the full ESP program at those 107 schools and at an additional 100 racially identifiable Chicago public schools in school year 1984-85 will involve only minor duplication of already existing desegregation programs in those schools. (Brady testimony)

220. Board's essential purpose for its ESP program is to improve instructional effectiveness in racially identifiable schools in order to improve educational outcomes for black and Hispanic children. That means improving achievement levels, attendance, discipline and the likelihood of a student's successfully moving to the next school level or into society in general. This is accomplished by programmatic interventions addressing six major areas: instructional emphasis, including increased time on task; leadership; use of assessment data; parental support and involvement; general school climate; and staff development and training. Among the elements of the ESP program designed to increase a student's time on task are extended-day and extended-year instruction, and full-day kindergarten instruction. (Brady testimony)

221. One of the major goals of the ESP program, as described in Board Exs. 28, 31, 32, 110 and 117, is to reduce the gap in achievement levels between national grade level norms and the achievement levels of minority children now attending, or who will attend, racially identifiable schools in the system. (Brady testimony)

222. "Effective schools" as a concept is based on educational research that suggests if the proper learning conditions are created, all children, regardless of their race and the racial composition of the school they attend, can learn. "Effective schools" as a model is an important structure for ensuring implementation of effective educational remedies at racially identifiable schools. It serves as a primary focus for implementation of the Plan's Educational Components, particularly those in curriculum-related areas. Board's "Effective Schools Project" is derived from and supported by the leading research in "effective schools" learning. (Brady testimony)

223. Board's inservice training component at each ESP school is a local, school-specific program that provides staff with

the specialized skills necessary effectively to implement the Plan's educational remedies. Each school's teaching staff is or will be receiving training intended to eliminate unequal treatment of minority pupils by raising each staff's awareness of its possible racial biases and by modifying any biased attitudes, expectations and behaviors toward the teaching of minority pupils. Each school's teaching staff also is or will be receiving training designed to develop the specialized skills, instructional methods and educational techniques necessary effectively to teach and to increase the academic achievement of minority pupils who must remain in racially identifiable schools. Each ESP school's inservice component is directed toward instructing staff in meeting the particular educational needs of minority pupils and in adapting existing instructional approaches to meet those needs successfully. (Brady testimony)

224. Board's ESP program described in Board Exs. 28, 30, 31, 110 and 117, as implemented in 107 racially identifiable schools in school year 1983-84, materially aids the successful implementation of the Educational Components of the Plan. That ESP program eliminates or alleviates the effects of racial segregation on minority children in that it raises the achievement levels of minority children, ends the unequal treatment of minority children in racially identifiable schools by teachers and administrative staff, and reduces the psychological pressures of attending racially identifiable schools and the resulting loss of self-esteem. (Brady testimony)

225. Implementation of the ESP program in the 45 racially identifiable target schools in school years 1981-82 and 1982-83 has raised the median level achievement scores of minority children as described in Board Exs. 36, 37 and 38 (as substituted and modified by Board Ex. 91). (Brady testimony)

226. To close the existing gap in grade level norms and achievement levels between students in integrated schools and

minority students attending racially identifiable schools, it will be necessary to implement the full ESP program in the 45 original target schools for another 3 to 5 years and in the 62 additional racially identifiable schools for another 4 to 6 years. (Brady testimony)

227. With adequate funding, Board would continue to implement the full ESP program in those 107 schools in school year 1984-85. In addition, it would implement the full ESP program in the next 100 lowest ranking schools as determined by the same formula ("Level II schools"). (Brady testimony)

228. Board Ex. 28, as modified by Board Ex. 117 and Dr. Brady's testimony, sets forth the projected cost of implementing a full ESP program in 207 racially identifiable schools for school year 1984-85. Those cost figures are reasonable under the circumstances shown at trial. (Brady testimony; Glasper testimony)

229. Board Ex. 28, as modified by Board Ex. 117 and Dr. Brady's testimony, sets forth the estimated cost in school year 1984-85 of implementing certain components of the ESP program at racially identifiable schools ("Level III schools") not participating in the full ESP program. Those projected cost figures are a reasonable estimate under the circumstances shown at trial. If the estimate of $10 million were to prove inaccurate, the figures could be adjusted by reducing the United States' payment to Board in a subsequent year. (Brady testimony; Glasper testimony)

230. Board Ex. 31 sets forth the amount Board expects to spend in school year 1983-84 for implementing certain components of the ESP program at the 100 Level II racially identifiable schools not currently participating in the full ESP program. Those projected cost figures are reasonable under the circumstances shown at trial. (Brady testimony; Glasper testimony)

231. To implement the Educational Components of the Plan, Board must at a minimum implement certain components of the ESP program at both the 100 Level II schools and the Level III schools. Such components to be implemented at the nonparticipant racially identifiable schools are those that require full-day kindergarten at each of those schools, the use of extended-day and extended-year instruction, and the inservice training of staff at those schools. For the reasons stated in Finding 224, implementation of those components of the ESP program at racially identifiable schools not participating in the full ESP program will materially aid the successful implementation of the Educational Components of the Plan. (Brady testimony; Glasper testimony; Board Ex. 117)

232. With adequate funding, Board would implement a full ESP program at the 100 Level II schools. Such full implementation would materially aid successful implementation of the Educational Components of the Plan for the reasons stated in Finding 224. Board's cost of such implementation in school year 1984-85 would be as shown on Board Ex. 117 and would be reasonable under the circumstances. Full implementation at those schools would reduce the cost of implementing certain ESP components at racially identifiable schools not participating in the full ESP program to approximately $10 million. (Brady testimony; Board Ex. 117)

233. Board Ex. 28 represents an initial estimate, prepared in August and September of 1983, of the cost and budget breakdown of the program components (and the program elements) designed materially to aid the implementation of the Plan (Brady testimony). Board Ex. 117 was prepared by the OEEO staff, under the direction and supervision of Dr. Brady, in response to requests made by the United States and this Court during the course of this hearing. Board Ex. 117 reflects the cost in school year 1984-85 of implementation of the full ESP program at 207 schools and the partial implementation of

the ESP program at all other racially identifiable schools (Brady testimony). It also reflects:

(a) corrections of errors and duplications in Board Ex. 28;

(b) consideration of the fact that the detailed line-by-line budget breakdown by cost category for certain of the program elements differs slightly from that initially set forth in Board Ex. 28;

(c) consideration of the fact certain of the program elements set forth in Board Ex. 28 were funded in part in school year 1983-84 by Board incremental desegregation expenditures and the fact Board is expected to provide $67.7 million for incremental desegregation expenditures in school year 1984-85, thereby enabling Board to provide continued funding for certain of the program elements included in Board Ex. 28;

(d) consideration of the fact certain of the items funded in school year 1983-84 are one-time costs and will not recur in subsequent years.

(Brady testimony) With respect to program components funded in school year 1983-84 with moneys appropriated by the Yates Bill, Board Ex. 117 contains three columns of numbers: *the first* representing the line-by-line budget breakdown of costs as set forth in Board Ex. 28; *the second* representing those portions of program elements actually funded in 1983-84; and *the third* representing the amount required to implement those programs in school year 1984-85. (Brady testimony) With respect to program components funded in school year 1983-84 with incremental Board funds, Board Ex. 117 contains four columns of numbers: *the first* representing the line-by-line breakdown of costs as set forth in Board Ex. 28; *the second* representing those portions of program elements actually funded in school year 1983-84; *the third*

representing the amount required to implement those programs in school year 1984-85 (after consideration of non-recurring costs; and *the fourth* representing the amount Board will not be able to fund from its own resources in school year 1984-85, despite its good faith efforts. (Brady testimony)

234. Board's Trainers Institute program is intended to build within the Chicago public school system the internal capacity to provide inservice training to teachers and staff for implementation of the Student Assignment Plan and the Educational Components, and generally for the education of minority children in racially identifiable schools. That Institute will materially aid successful implementation of the Plan. It will eliminate or alleviate the effects of racial segregation on minority children in that it will assist the raising of their achievement levels and help end the unequal treatment of minority children in racially identifiable schools by teachers and administrative staff. (Brady testimony)

235. With adequate funding, Board would fully implement the Trainers Institute in school year 1984-85. Board Ex. 117 sets forth the projected cost of implementing the Trainers Institute in 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

236. Board's Management Information System is intended to establish and maintain a comprehensive information system to collect, analyze, review and disseminate data related to all desegregation activities under the Educational Components and the Student Assignment Plan. That System materially aids successful implementation of the Plan by tracing and measuring progress in achieving the goals of the Plan. Board Ex. 117 sets forth the projected cost of the System. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

237. Board's Equity Compliance program described in Board Ex. 28 is intended to manage program expenditures, gather OEEO statistical data, carry out desegregation reporting functions, monitor and audit desegregation activities and establish means to measure and assess compliance with the Plan. Each component of that program will materially aid successful implementation of the Educational Components of the Plan. Certain aspects of the program were implemented in school year 1983-84, as detailed in Board Ex. 31 and 117. Its cost of implementation in school year 1984-85, as set forth in Board Ex. 117, is reasonable under the circumstances. (Brady testimony; Glasper testimony)

238. Board's systemwide Staff Development program for racially identifiable schools, described in Board Ex. 28, is intended to provide staff with the information and skills necessary to implement effectively the Plan's educational components. Through twelve major conferences, staff from all racially identifiable schools will receive a general overview in many desegregation-related areas, including the requirements of the Plan, and methods of ensuring equal educational opportunity in a racially identifiable school. Specific topics encompassed in those conferences will address multi-cultural awareness and teaching approaches, effective discipline techniques, classroom management and instructional strategies to raise minority pupils' academic achievement. General staff development provided through the program is intended to introduce staff to problems in implementing the Plan, and to increase staff's effectiveness in dealing with the problems addressed. (Brady testimony)

239. Board's Staff Development program for the racially identifiable schools will materially aid successful implementation of the Plan. It will eliminate or alleviate the effects of racial segregation on minority children in that it will assist

teachers in raising the achievement levels of the children and it will help in ending the unequal treatment of minority children in racially identifiable schools by teachers and staff. Its consultant component is required to hire specialists to conduct inservice training conferences. Those consultants are necessary to implement the Staff Development program. Board Ex. 117 sets forth the projected cost of the program for school year 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

240. Board's systemwide Staff Development program for Desegregated Schools, described in Board Ex. 28, is intended to provide staff with general information and an overview of skills necessary to effectively implement the Plan's student assignment and educational components. Staff from desegregated schools will receive training in many areas, including the requirements of the Plan, multi-cultural awareness and teaching approaches, effective discipline techniques and classroom management in a desegregated setting. That program will materially aid the successful implementation of the Plan. It will eliminate or alleviate the past effect of racial segregation on minority children now attending desegregated schools by assisting teachers in raising their achievement levels. It will also assist in the effective implementation of the Plan by raising staff awareness of and eliminating its unequal treatment of minority pupils in desegregated schools. As set forth in Board Exs. 28 and 117, the cost of that program is reasonable under the circumstances. (Brady testimony; Glasper testimony)

241. Board's Within-School Segregation Program is intended to gather information about the racial composition of classrooms and to monitor the assignment of students to classrooms within particular schools. That program will materially aid successful implementation of the Plan. It will eliminate or alleviate the racial segregation of students in classrooms through, for example, forms of "tracking" or "ability grouping." It will accordingly ensure that students are

actually taught, insofar as is practicable, in a physically desegregated environment. Board Ex. 117 sets forth the cost of the program for school year 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

242. Board's Magnet Schools programs, described in Board Ex. 28, are intended to construct new magnet schools, develop and expand special curriculum offerings at certain racially identifiable schools, and provide inservice training and staff development at 150 magnet schools and magnet programs. Specialized curriculum offerings or magnet programs will be introduced or expanded at racially identifiable "community academies" as part of the special educational improvements and remedies required by the Plan. Staff training and advisory services are necessary and will materially assist staff in planning and developing the expanded curriculum offerings and in successfully introducing them in racially identifiable schools. Except as stated in Finding 243, the Magnet School programs described in Board Ex. 28 will materially aid successful implementation of the Plan. Board Ex. 117 sets forth the cost of those programs for school year 1984-85. That cost is reasonable under the circumstances. (Brady, Glasper, Viso testimony)

243. Board did not demonstrate the proposed Residential Magnet High School would have sufficient marginal utility (on the testimony it would serve only about 200 students), in relation to its more than $9 million cost, so as to justify a finding the school will materially aid successful implementation of the Plan. By way of contrast, although the proposed Agricultural Magnet High School is also challenged by the United States as insufficiently related to the purposes of the Plan, the testimony establishes that school would meet a demonstrated need and serve minority students in a manner that meets the standard stated in Finding 242. That is also true of all the other Magnet School programs.

244. Board's Staff Development Program at the 150 magnet schools and magnet programs, as referred to in Finding 242, is intended to meet school specific needs related to the particular school's curriculum, including maintaining the consistency of the magnet program with systemwide standards, training teachers in instructing students in the special magnet program offering, and planning, developing and refining the magnet program to maintain its quality. That program also will train staff in multicultural awareness, teaching approaches and classroom management in a desegregated school. Its purpose is to enhance the likelihood that magnet schools and magnet programs will develop and maintain the quality curriculum and school climate necessary to attract a desegregated student body. (Brady testimony)

245. Each component of the Staff Development Program referred to in Findings 242 and 244 is directly related to the Plan and will materially aid its successful implementation by raising minority pupil achievement, eliminating unequal treatment of minority pupils, and achieving and maintaining physical desegregation in school populations. With adequate funding the Board would implement those components of its magnet school program in school year 1984-85. Board Ex. 117 sets forth the cost of implementing those components in school year 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

246. Board's Special Education/Testing program described in Board Ex. 28 is intended to implement and, as required by the Plan, to validate procedures designed to ensure non-discriminatory assessment and placement of students in educable mentally handicapped classes. Consultants and in-service programs are necessary to provide Board staff with the skills to evaluate whether its current assessment procedures are accurate and race neutral. In addition the Special Education/Testing program is intended to provide transition services

and special educational support for students who were previously placed in mentally handicapped classes, based upon potentially biased assessment instruments, and who are now being returned to the regular classroom. Inservice training is required to provide teachers and other staff with awareness of and the skills to deal with such students' special educational needs during the period of their transition to the regular classroom. (Brady testimony)

247. All components of the program described in Finding 246 will materially aid Board's implementation of the Plan. It will eliminate or alleviate the effects of racial segregation on minority pupils by assisting their return to regular classrooms and thus raising their achievement levels, and it will help end the unequal assessment and placement of minority pupils in special education classes. Its cost for school year 1984-85, as set forth in Board Ex. 117, is reasonable under the circumstances. (Brady testimony; Glasper testimony)

248. Board's Vocational and Technical Education Program, as described in Board Exs. 28 and 116, is intended to provide vocational educational information to staff and students, to recruit minority students for vocational education classes, to provide vocational educational support services for minority students, and to expand and adapt vocational education program offerings to increase the opportunity for minority students to participate in vocational education programs. Inservice training and consultant services are required to acquaint teachers with vocational education opportunities open to minority pupils, to improve the staff's skills and capabilities effectively to provide vocational education services to minority students, and to assist staff in planning, developing and effectively providing additional vocational program offerings to students. These inservice and consulting components are directly related to the Plan and will materially assist in implementing its Vocational and Technical Education program. (Brady testimony; Viso testimony)

249. Except as stated in Finding 250, the components of the Vocational and Technical Education program will materially assist the Board in implementing the Plan. They will alleviate or eliminate the effects of past segregation in vocational and technical education programs by various activities intended to end the unequal participation of minority students in these programs. Their respective costs for school year 1984-85, as set forth in Board Ex. 117, are reasonable under the circumstances. (Brady testimony; Viso testimony; Glasper testimony)

250. One component of the Vocational and Technical Education program testified to by Dr. Viso (the Handicapped component) cannot fairly be included in the cost of the Plan for current purposes. On the present record it lacks a sufficient nexus to the purposes of the Plan — as compared with the general goal of improving the overall quality of education. Though in its post-hearing submission Board stated that blacks represent a higher percentage of EMH students in the system (about 81%) than their percentage of total school enrollment (about 61%), no testimony established what percentage EMH students were of the total "Handicapped" group that could be assisted by the program. Thus the test of materiality is not satisfied. This is simply a matter roof, and to the extent such proof may be sharpened in subsequent years the item may perhaps be allowable. This Court of course recognizes that most of the other Vocational and Technical Education components also involve estimates, but each of those estimates is sufficiently reasonable (and not effectively challenged by the United States) to satisfy Board's burden of proof. In any case Board will be fully accountable for its use of funds, and to the extent there may prove to be any over-allocation as to any item based on actual experience, adjustments in the United States' payments to Board can be made in future years.

251. Board's Department of Curriculum activities related to its Plan needs, as described in Board Exs. 28 and 114, are intended to ensure that curriculum offerings are consistent with the goals of the educational components and modified and refined to meet those goals. Desegregation-related activities in the Department of Curriculum will include, planning, developing and implementing the special curriculum improvements required by the Plan's Educational Components, coordinating those improvements and monitoring their consistency with systemwide educational goals, maintaining the curriculum and course quality of the special educational programs required by the Educational Components. All inservice and advisory components of those programs are necessary to provide Board staff with the information and skills to plan and provide effectively the various curriculum development and implementation activities necessary to achieve the overall goals of the educational components. (Brady testimony; Heing Testimony)

252. Except as stated in Finding 253, the components of the Curriculum and Instruction program will materially assist the Board in implementing the Plan by raising the achievement levels of minority students and maintaining or enhancing the quality of curriculum designed to raise the achievement of minority students. Board Ex. 117 sets forth the cost of implementing these curriculum and instruction activities in school year 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Heing testimony; Glasper testimony)

253. "High School Renaissance," as described in Dr. Heing's testimony, was not sufficiently distinguished from Board's ordinary goals of system-upgrading to justify inclusion of that program in Plan costs. Dr. Heing referred to providing a "strengthened diploma" — of course a commendable goal, but one that appears clearly on the other side of what is

admittedly not always a bright line distinction between (a) Plan implementation and (b) general benefits to educational goals of the school system as a whole.

254. Board's Student Discipline program, described in Board Ex. 28, is intended to provide discipline managers in schools who will enforce the Uniform Discipline Code, provide training to staff in the provisions of the Code and behavior modification techniques, develop and operate in-school suspension and behavior improvement programs as an alternative to suspension, and monitor and report on disciplinary infractions. That program will materially assist the Board in implementing the Plan by eliminating or alleviating unequal disciplinary treatment of minority pupils. Its cost for school year 1984-85, as set forth in Board Ex. 117, is reasonable under the circumstances. (Brady testimony; Glasper testimony)

255. Board's Bilingual Education programs, as described in Board Ex. 28, are intended to assist in achieving the national origin desegregation required by the Plan. Activities that would be undertaken include establishing special "immersion" educational programs to instruct pupils in their native languages until they can make the transition to regular classrooms, developing a special curriculum responsive to the needs of bilingual students, performing research on the educational needs of bilingual and limited English proficient students, and recruiting qualified bilingual teachers. Inservice training and consulting activities are necessary to provide staff with the skills to conduct research, plan and develop bilingual and limited English proficient education programs, and effectively to instruct bilingual and limited English proficient students. (Brady testimony; Gonzales testimony)

256. Except for Statewide Network (which was withdrawn by Board), each component of the Bilingual Education program will materially assist Board in implementing the Plan. Each will alleviate or eliminate the effects of segregation on

bilingual or limited English proficient students in that it will assist the raising of their academic achievement and help end the unequal treatment of and unequal educational opportunities available to those children. Each component's cost for school year 1984-85, as set forth in Board Ex. 117, is reasonable under the circumstances. (Brady testimony; Gonzales testimony; Glasper testimony)

257. Board's Evaluation program described in Board Ex. 28 is intended to permit OEEO to collect, analyze and evaluate information to determine the overall effects of the Plan, as implemented, and to indicate areas where programs must be refined or modified to achieve the Plan's goals. Consultant and inservice programs are necessary to provide staff with the skills to conduct this research and evaluate the effects of the Plan. This Program will materially aid the successful implementation of the Plan by providing information necessary to continue and correct implementation of the plan and to reach the Plan's goals. Board Ex. 117 sets forth the costs of the Evaluation Program for school year 1984-85. That cost is reasonable under the circumstances. (Brady testimony; Glasper testimony)

258. Inservice training and staff development programs described in various of Findings 223-57 do not duplicate each other and do not duplicate other inservice training provided by Board. Each program-related training or staff development activity will address specific needs and topics related to the program it will assist in implementing. Those program-specific needs will not be addressed to the extent required effectively to implement the programs in the Educational Components in the general, systemwide desegregation related staff development programs operated by OEEO, nor in any other of Board's ongoing staff development activities. (Brady testimony)

259. All costs (with reference both to the total amount and to the amount Board is unable to fund despite its every good

faith effort) of the program elements set forth in Board Ex. 117 are reasonable estimates of the amounts needed to implement such programs. (Testimony of Brady, Viso, Heing, Gonzalez and Glasper) Those costs represent appropriate modifications, where required, of costs originally reflected in Board Ex. 28. In turn, the cost attributable to each program element of Board Ex. 28 was included therein after consultation beteween the Budget Office, OEEO and central office administrative personal responsible for the preparation thereof. (Brady and Glasper testimony) Those projected costs were reviewed and verified by Board's Office of Budget and Financial Planning. (Glasper testimony)

260. Of the $108 million in program components identified by Board Ex. 28, approximately $6 million is being funded by Board resources in school year 1983-84. (Glasper testimony)

261. Another $20 million, appropriated by the Yates Bill, is being devoted to Board Ex. 28 program components during the second half of the 1983-84 school year. (Brady testimony) Board Ex. 31 sets forth those elements of the Educational Components of the Plan that are being funded by the $20 million appropriated by the Yates Bill. (Brady testimony)

262. Board Exs. 31, 35, 41 and 113 accurately describe the desegregation programs and anticipated expenditures of Board during school year 1983-84. Those include the approximately $57 million in expenditures for programs continued from school year 1982-83, the planned approximately $10 million increase in desegregation expenditures for school year 1983-84 (further described in Board Exs. 35 and 113), and the $20 million in anticipated expenditures resulting from by the Yates Bill (further described in Board Ex. 31). Each of the programs described in those Exhibits is necessary for adequate implementation of the Plan and materially aids in the implementation of the Plan. (Glasper testimony; Brady testimony)

263. Neither Board Ex. 28 nor Board Ex. 117 makes any provision for increases in employee compensation over and above the levels in effect for the 1982-83 school year. They do not, for example, take account of the 5% salary increase agreed to by Board and the Chicago Teachers' Union for the 1983-84 school year or of any such future salary increases that may be negotiated between Board and its employees. (Glasper testimony)

264. Set forth after Finding 265 is a chart that reflects the adjustments to Board Ex. 28 made by Board Ex. 117 (as described in Finding 233) and that reflects the 5% salary increase[30] implemented in school year 1983-84 referred to in Finding 263. Set forth on the following seven pages are individual charts that reflect such adjustments made for each of the program components for which there is more than one program element: Staff Development, Magnet Schools, Special Education/Testing, Vocational/Technical Education, Curriculum, Bilingual Educational and Evaluation (Brady and Glasper testimony).

265. As reflected by the attached charts, the level of funding adequate for full implementation of the Plan in school year 1984-85 (as modified to reflect Findings 243, 250 and 253) is approximately $171.631 million. Of that amount, Board has been able to budget approximately $67.773 million, leaving an increment of approximately $103.858 million that Board, despite its best efforts, will not be able to fund. For planning purposes, it can reasonably be assumed that approximately $171.631 million will be necessary for adequate implementation of the Plan in subsequent school years. (Brady testimony)

See charts, Supplemental Appendix pp. S-5—S-11.

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[30] To reflect this increase, an appropriate adjustment was made in the teacher salary and career service salary cost categories set forth in the budget sheets included in Board Ex. 117.

266. Each of the various programmatic elements that, in their entirety, make up the Student Assignment and Educational Components of the Plan materially aids in the desegregation of the Chicago public schools. (Testimony of Brady, Viso, Heing and Gonzales) Those programs work together with ongoing programs first implemented in earlier school years to achieve the goals of the Plan's Educational Components. (Brady testimony)

267. Prior to school year 1983-84, only certain elements of the Educational Components had been implemented at the vast majority of racially identifiable schools and, as a result, achievement of the Plan's overall objectives has been limited. Even with the implementation of additional elements this school year because of the increased Board budget for desegregation and the appropriation in the Yates Bill, many other elements have yet to be implemented. (Brady testimony)

268. At this point, school year 1984-85 is the first in which full implementation of the Plan could occur. In the months that followed the June 1983 hearing, Board had anticipated that the resources necessary to implement fully the various components of the Plan would be made available by the United States for the 1983-84 school year, so as to make it the first year of full implementation. As a result, Board Ex. 28 was prepared under the assumption that each of the various program elements would be initially implemented in 1983-84. However, only $26 million in new financial resources became available, allowing for only limited implementation of these program elements. (Brady and Glasper testimony)

269. Because of the passage of time, full implementation became impossible in school year 1983-84. Given both the schedule of these proceedings (including the possibility of an appeal by the United States) and the nature of the school year calendar, additional resources could not be received and prop-

erly devoted to implementation of the programs before the beginning of school year 1984-85. It is accordingly necessary to treat school year 1984-85 as the first year of full implementation. (Brady testimony)

270. Educational Components of the Plan were intended to supplement Chapter I programs in racially identifiable schools where such programs are in effect. If Chapter I funds were used for desegregation programs, the aggregate effects of low income status and racial segregation would not be addressed, and low income minority students would receive less compensatory programming than contemplated by Chapter I and the Plan. (Brady testimony; Fagan cross-examination testimony)

271. There are a substantial number of racially identifiable schools not eligible for Chapter I programs, and even in those schools eligible for Chapter I programs a significant number of minority students are not qualified to participate because their achievement levels, while below grade level, are not low enough. In short, the latter group of minority children, and those now attending or who will attend racially identifiable schools ineligible for Chapter I programs, would be foreclosed from critical remedial programs designed to alleviate the educational impact of past segregation that affects each of them, even if Chapter I funds were used for funding for the Plan. (Fagan cross-examination testimony)

272. Diverting Chapter 1 funds to Desegregation Plan costs would divest low income, educationally deprived students of the benefits of Chapter 1 ECIA programs in order to provide minority students the benefit of the Plan's Educational Components. That would offset or neutralize the benefit of the desegregation remedy and would diminish the aggregate impact of the compensatory and desegregation programs provided by Chapter 1 and the Consent Decree. (Brady testimony; Fagan cross-examination testimony)

Board's Financial Affairs and Condition, and the Financial Aspects of School Desegregation

1983-84 Incremental Desegregation Expenditures

301. As of September 1983 the Chicago public school system comprised 70 high schools, 442 elementary schools and 25 branches, 25 child-parent centers and a small number of schools of other types (such as special education facilities, apprentice and trade schools, adult schools and bilingual-bicultural schools). Enrollment for the 1983-84 academic year is approximately 434,000 students. As of June 1983 Board employed nearly 40,000 persons, of whom approximately 27,400 were represented by the Chicago Teachers' Union and approximately 9,500 were members of other unions and employee groups that negotiate with Board. (Stip. 201)

302. Board's budget for school year 1983-84 provides for appropriations of approximately $1.455 billion for operating expenditures. (Stip. 202)

303. As part of the $1.455 billion budgeted for operating expenditures in school year 1983-84, Board budgeted approximately $67.7 million for incremental desegregation expenditures. After receiving the $20 million appropriated by the Yates Bill, Board increased that amount to approximately $87.7 million. (Stip. 203)

304. Incremental desegregation expenditures refers to those desegregation expenditures which are budgeted and accounted for by Board by specific three-digit codes. Those three-digit project codes identify appropriations and expenditures by their source or purpose. (Stip. 204)

305. In 1980-81, the year in which the Consent Decree was entered, incremental desegregation expenditures consisted of certain student assignment programs accounted for under Project Code 512 (as described in Finding 306). As Board expanded implementation of the Plan in each subsequent

school year, additional project codes were established to account for the various programs that constituted the components of such expansion. (Stip. 205)

306. Incremental desegregation expenditures are budgeted and accounted for by reference to the following three-digit project codes:

(a) Project Code 512 appropriations and expenditures refer to components of the Plan consisting of those initial elements of the Options for Knowledge student assignment programs that were initiated before the Consent Decree and are sometimes referred to as the continued "Access to Excellence" programs. Generally those are magnet schools and programs and voluntary transfer programs.

(b) Project Code 163 appropriations and expenditures refer to components of the Plan initially established in school year 1981-82, primarily relating to implementation of the Plan's Educational Components at racially isolated schools (and in part in 1981-82 to certain student assignment programs established in that year).

(c) Project Code 946 appropriations and expenditures refer to components of the Plan that relate to implementation of the Educational Components at racially isolated schools, also initially established in school year 1981-82 and funded by a supplementary allocation of State Title I funds.[31]

(d) Project Code 536 appropriations and expenditures refer to components of the Plan funded under Title VII of the Elementary and Secondary Education Act of 1965 ("ESEA") to implement certain elements of the bilingual education aspects of the Plan, beginning in school year 1981-82.

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[31] Part of the money budgeted by Board for incremental desegregation expenditures is attributable to State Title I school aid. State Title I aid constitutes that portion of Common School Fund State Aid (or general state distributive aid) distributed to Illinois school districts based on the number of economically disadvantaged or "Title I eligible" students enrolled in each district. Addendum A attached to these Findings (following Finding 376) describes the relationship between State Title I school aid and desegregation expenditures. (Bacchus Testimony)

(e) Project Code 576 appropriations and expenditures refer to components of the Plan funded under ECIA Chapter 2 and relate to the salaries of central office and support staff engaged in inservice training, recruitment, evaluation and management of the Plan. Those federal funds were first received in school year 1981-82 as a grant under ESAA.

(f) Project Code 065 appropriations and expenditures refer to components of the Plan initially established in school year 1982-83 to implement new and expanded elements of the Options for Knowledge student assignment programs and related transportation costs.

(g) Project Code 496 appropriations and expenditures refer to components of the Plan funded by the $10 million increase in Board resources for desegregation implementation in school year 1983-84.

(h) Project Code 400 appropriations and expenditures refer to components of the Plan funded by the $20 million appropriated by the Yates Bill and relating to expansion of the implementation of Educational Components at racially isolated schools. (Stip. 206)

(Bacchus Testimony)

307. Set forth on the following page are incremental desegregation appropriations and expenditures, identified by project codes, for school years 1980-81 through 1982-83 and incremental desegregation expenditures of $87.7 million, also identified by project codes, Board has budgeted for school year 1983-84. (Stip. 207; Glasper testimony; Board Ex. 41)

Four-Year Deseg Analysis Summary

See tables, Supplemental Appendix pp. S-12—S-14.

308. Board budgeted and spent approximately $57 million for "incremental desegregation expenditures" in school year 1982-83. Of that amount approximately $2.3 million was derived from federal resources: approximately $.5 million in funds under Title VII of ESEA to implement certain aspects of

the Plan's bilingual education components, and approximately $1.8 million in funds received by Board under Chapter 2 of ECIA. This latter $1.8 million was equal to the amount of ESAA funds Board had received before the repeal of ESAA and the enactment of ECIA and thus constituted that portion of the ECIA Chapter 2 block grant Board determined to allocate to implementation of the Plan. All the remaining approximately $54.5 million was derived from Board resources. (Glasper testimony)

309. Resources for the $87.7 million in incremental desegregation expenditures budgeted for school year 1983-84 are being provided as follows: approximately $65.4 million from local resources and approximately $22.3 million from federal resources. (Stip. 208)

310. Of the $22.3 million in federal resources provided to fund Board desegregation expenditures, $20 million derives from the Yates Bill, $1.8 million derives from ECIA Chapter 2 funds and approximately $.5 million derives from ESEA Title VII (Stip. 209)

311. With respect to incremental desegregation expenditures, Board resources budgeted for desegregation implementation increased by $10 million (or approximately 18%) from the level budgeted for the 1982-83 school year. Desegregation implementation was the most significant area of programmatic expansion undertaken by Board for school year 1983-84. (Stip. 211; Glasper testimony;, Bacchus testimony)

312. All the increase in federal resources received by Board in school year 1983-84 for desegregation implementation is attributable solely to the $20 million appropriated by the Yates Bill. (Stip. 212)

1983-84 Ancillary Desegregation Expenditures

313. Incremental desegregation expenditures do not include expenditures, referred to as ancillary desegregation ex-

penditures, that are made by Board to implement the desegregation plan but are not identified by specific project codes and not included in the $87.7 million amount set forth in Finding 307. Included within ancillary desegregation expenditures are the costs of all "quota" or "formula" teachers at magnet and magnet-type schools. For school year 1983-84 the cost of such teachers is approximately $20 million. Also included in ancillary desegregation expenditures are the costs of providing the basic systemwide (or "formula") level of supplies and instructional equipment at magnet schools, scholastic academies and metropolitan high schools. (Glasper testimony)

314. Also included in ancillary desegregation expenditures are the costs related to student transportation for the Disney Magnet School. This cost is approximately $1.6 million for school year 1983-84.

315. Also included in ancillary desegregation expenditures are various central office and field administrative expenditures relating to the implementation of the Plan. (Brady testimony; Glasper testimony)

316. Ancillary desegregation expenditures are expected to continue at approximately the 1983-84 level in future school years. (Brady testimony; Glasper testimony)

317. Board does not contend that (a) these ancillary costs should be included in the calculation of the amount required for full implementation of the Plan or (b) the United States should be responsible for funding all or a portion of such costs. However, these costs further emphasize that Board has devoted a substantial amount of its total resources to the implementation of the Plan.

1983-84 School Budget—Board Resources and Expenditures

318. Evidence as to Board's present and projected financial condition was presented through the testimony of Board's chief financial and business officers (J. Maxey Bacchus, Board's

Business Manager, and Rufus Glasper, its Director of Budgeting and Financial Planning) as well as through various Board budget documents.

319. Board Ex. 43 is the Board's annual school budget for 1983-84, which contains summary tables of Board revenue and expenditures for the 1983-84 school year budget. (Stip. 216)

320. Board's four primary sources of operating revenue are local property taxes (34.6%), state school aid (45.6%), federal educational assistance (13.8%), personal property replacement taxes (3.8%) and miscellaneous (2.2%). (Stip. 217)

321. Rates at which Board can levy taxes for its four general operating funds (education. building, textbook and playground) are prescribed by the Illinois School Code (Ill. Rev. Stat. ch. 122, 34-1 et seq.) and determined by the Illinois General Assembly and not Board. Board is presently levying taxes for those funds at the maximum rates authorized by the General Assembly. (Stip. 218)

322. State school aid received by Board is determined by various formulae prescribed by the School Code, as determined by the Illinois General Assembly and not Board. (Stip. 219)

323. Federal educational assistance received by Board is determined by (a) the amounts appropriated by Congress for various educational programs and (b) the manner in which the Department of Education and, in certain instances, the Illinois State Board of Education determine to allocate these resources. Board does not have control over these determinations; its role is limited to making applications and seeking to meet applicable eligibility and competition requirements. (Stip. 220)

324. Personal property replacement tax revenues are generated through an income tax on corporations, an income tax on partnerships and a tax on the invested capital on certain public utilities. Those tax revenues are collected by the State of

Illinois and distributed to local taxing districts, including Board. (Stip. 221)

325. Personal property replacement tax revenue collections are a function of the rates in effect for such taxes, as prescribed by the Illinois General Assembly. Personal property replacement tax revenues distributed to Board are determined pursuant to a formula prescribed by the General Assembly. Board does not have control over those decisions. (Stip. 222)

326. In sum, as this Court said in Opinion I, Board "is not the master of its own fate". 554 F. Supp. 912, 926. Except for its own tax levy, which has no available increment, Board's revenues are wholly determined by other governmental bodies and agencies, particularly the State of Illinois and the United States. To the extent Board has limited discretion over the amount of its revenues, such as the discretion to levy taxes up to a maximum amount permitted by state statute, Board has exercised such discretion to maximize its revenues. (Stip. 216-22; Bacchus testimony; Board Ex. 155))

327. While Board has a limited ability to generate new resources, the United States, by sharp contrast, has the full capability of generating new resources or increasing existing resources. However the United States has not done so (and has in fact taken extensive steps to limit the availability of funds for desegregation implementation). (Board Ex. 57; Findings 401-67)

328. Of $1.455 billion in total Board operating expenditures budgeted for school year 1983-84, approximately $1.162 billion (or approximately 75%) is budgeted for employee compensation, including pension and fringe benefits. All elements of employee compensation are subject to negotiation between Board and the various employee groups with which it engages in collective bargaining, including the Chicago Teachers' Union. Employee compensation levels cannot be determined unilaterally by Board. (Stip. 223)

329. Of the same $1.455 billion, approximately $91 million is budgeted for food and utilities, approximately $33 million for repair and rehabilitation of school buildings and approximately $23 million for payment of tuition for handicapped children who cannot be served in the public schools. That tuition rate is set by the State Board of Education, not Board. In the aggregate the various expenditure components described in Findings 328-29 represent approximately $1.309 billion, or 90% of Board's budgeted operating expenditures for school year 1983-84. (Stip. 224)

1979-80 Financial Crisis

330. Board suffered an acute financial crisis in November 1979. Its causes were the subject of various studies and commentaries, in particular a report of the Illinois General Assembly Joint House and Senate Chicago Board of Education Investigation Committee. Its most immediate cause, however, was Board's inability to engage in short-term borrowing. As a result it suffered a severe cash shortfall. It was forced to decide which of its obligations would be paid in timely fashion and which would of necessity be delayed in payment. By the latter part of December 1979 Board was virtually without any available cash. Governor Thompson convened a meeting in Springfield in early January 1980 to address Board's financial crisis. Participants at that meeting agreed to a multi-faceted plan, including (a) adoption of the School Finance Authority Act (the "Act"), leading to the creation of the Chicago School Finance Authority ("Authority"); (b) a three-phased financing plan to provide funds for Board (which plan was fully implemented during 1980); and (c) imposition of certain financial, legal and structural changes upon Board, including (i) the reduction in Board's educational fund tax rate from 2.11% to 1.61% of equalized assessed valuation, (ii) the appointment of a chief financial officer who has responsibility for preparing and supervising Board's budget and financial plan and who reports directly to Board and (iii) the expiration on April 30, 1980 of

the terms of office of all Board members who held office on January 16, 1980. (Stip. 225)

Relationship to School Finance Authority

331. Authority is a five-member body whose members are appointed by the Mayor and Governor and are not subject to approval by the General Assembly. It was created to serve two basic functions: (a) to exercise financial oversight and control over Board; and (b) to issue bonds and notes to provide financing for Board. It is to remain in existence until one year after the date that all bonds and notes it has issued are paid in full. It is currently anticipated Authority's obligations will not be fully paid until 2009, so that it will remain in existence until 2010. However, as discussed in the last paragraph of this Finding, it is likely many of its powers will be suspended before that time.

Financial Control and Oversight Powers. The most significant powers and responsibilities (and the corresponding duties imposed upon Board) are in the following areas:

(A) *Budgets:* Authority must approve or reject Board's annual budget for each fiscal year. Each budget must contain such information and detail as Authority may prescribe and must be based upon the revenue estimates Authority approves or prepares. Board must submit its budget to Authority at least 45 days before the beginning of the fiscal year to which the budget relates, and Authority is required to approve or reject Board's budget within 30 days of its receipt. Standards are established by the Act for Authority's review of the budget. It states Authority shall approve any budget it believes to be complete, reasonably capable of being achieved and consistent with the Financial Plan then in effect. Under the Act Authority does not have line-item veto powers over the budget — it must either accept or reject the budget in its entirety. Following the adoption of a budget for a fiscal year, Board must notify Authority of any material change in its revenue or expenditure

estimates for that year. Based on such changes Board may submit, or Authority may require Board to submit, a supplemental budget, or Authority may require Board to take other actions.

(B) *Balanced Budget:* Board is required to have a balanced budget in accordance with the accounting system and procedures Authority prescribes. Authority has promulgated regulations to govern Board's preparation of its annual budget and provide a framework for the determination of what constitutes a "balanced budget."

(C) *Financial Plan:* Authority has the power to approve or reject Board's Financial Plans. Each Financial Plan must cover a period of at least three fiscal years. It must contain a description of revenues and expenditures, provision for debt service, cash resources and uses, and capital improvements for each fiscal year covered. Authority has promulgated regulations setting forth the type of information and detail that must be contained in each Financial Plan. In connection with approving each Financial Plan, Authority must approve, reject or amend Board's revenue estimates. It may also review Board's operations and obtain budgetary data and financial statements. In general, Authority has a right of access to all information in Board's possession that it deems relevant. Authority also may issue recommendations or directives to Board to assure compliance with Financial Plans and may require Board to submit modified Financial Plans based upon revised revenue or expenditure estimates or for any other good reason. In the absence of a budget and Financial Flan that Authority has approved, the Act prohibits Board from making any expenditures other than for payment of its debt service obligations. Authority's regulations, as amended, require Board to submit each Financial Plan to Authority on or before the May 1 before the first fiscal year to which the plan relates. Thus the Financial Plan for fiscal years 1984-85 through 1986-87 was due May 1, 1984.

(D) *Contracts:* Authority has the power to adopt and amend regulations identifying categories and types of contracts and other obligations of Board that shall be subject to Authority's approval and the procedures for submitting contracts for approval. Authority shall approve those contracts if, in its judgment, the information required to be submitted is complete and the contract is consistent with Board's budget and Financial Plan then in effect. Authority has adopted regulations setting forth the types of contracts for which its approval will be required. They include collective bargaining agreements, contracts involving an amount in excess of $10 million, contracts in excess of $1 million involving the disposition of real property and contracts creating an obligation to repay borrowed money.

(E) *Chief Financial Officer:* Authority has the power to approve the appointment of and to remove Board's Chief Financial Officer.

(F) *Accounting and Auditing:* Authority may direct Board to reorganize its financial accounts, management and budgetary systems in whatever manner Authority deems appropriate to achieve greater financial responsibility and efficiency. Authority also has the power annually to approve Board's appointment of certified public accountants to audit Board's financial statements.

(G) *Cash Management:* Authority is authorized to require Board to establish and maintain separate cash accounts and separate bank accounts in accordance with such rules, standards and procedures as Authority may prescribe. Authority also may assume exclusive administration of Board's cash accounts and bank accounts and withdraw funds from such accounts for Board's lawful expenditures.

Duration of Powers: Authority will retain the power to approve or reject Board's budget and the power to examine its business records and audit its accounts for as long as Authority remains in existence. However, other powers of Authority set

forth above (including without limitation the power to review and approve Financial Plans and contracts and to require Board to appoint a Chief Financial Officer) become suspended upon certification to the Mayor and Governor that Board has completed three successive fiscal years with a budget balanced in accordance with standards prescribed by Authority. However the Act also provides the suspended powers will be restored upon Authority's certification that Board has failed to adopt a balanced budget or failed to achieve a balanced budget for two successive fiscal years. It is generally thought Board's fiscal year ended August 31, 1982 was the first fiscal year to qualify under this statutory definition, so that Board has now achieved two successive years of a "balanced budget." (Stip. 226; Board Ex. 115)

332. Authority has approved Board's budget for school year 1983-84 as complete, reasonably capable of being achieved and balanced in accordance with accounting systems and procedures prescribed by Authority. (Stip. 227)

Projected Deficits for Future Years

333. Board has adopted, and in December 1983, Authority approved Board's Financial Plan for fiscal years 1984-86. That Financial Plan is Board Ex. 51. (Stip. 228) It projects the following deficits: for fiscal year 1984-85 — $146.7 million; for fiscal year 1985-86 — $71.9 million. (Stip. 229)

334. Board's projected deficit for fiscal year 1984-85 is based on projected expenditures of approximately $1.490 billion and projected revenues of approximately $1.343 billion. Board's projected deficit for fiscal year 1985-86 is based on projected expenditures of approximately $1.532 billion and projected revenues of approximately $1.460 billion. (Stip. 230) Those projections are based on a series of assumptions set forth at pages 3-1 through 3-8 of the 1984-86 Financial Plan. (Stip. 231)

335. Among the assumptions upon which the 1984-86 Financial Plan is based are (a) no increases in employee salaries over the level in effect for school year 1983-84 (except for longevity or "step" increases relating to increased years of service); (b) certain percentage increases in federal funding; (c) no expansion of educational programs funded by general Board resources (as opposed to state-mandated or federally-funded programs); (d) continued funding for incremental desegregation expenditures of approximately $67.7 million (that represents a continuation of desegregation programs budgeted from Board funds for school year 1983-84, but without the $20 million one-time appropriation from the Yates Bill); and (e) increases in expenditures to address the impact of inflation in certain areas, such as utilities. (Stip. 232; Bacchus testimony; Glasper testimony)

336. As regards federal funds, Board's revenue estimates for 1984-85 (as set forth in its Financial Plan) reflect a net decrease of approximately $13 million resulting from (a) a decrease of $20 million (reflecting the one-time nature of the funds appropriated by the Yates Bill) and (b) a net increase of approximately $7 million in various other federal funds received by Board, including ECIA, Chapter I funds.

337. In June 1983 the Illinois General Assembly restored to 2.11% the maximum rate at which Board could levy taxes for its educational fund. It also adopted legislation that provided educational fund taxes could be extended at the 2.11% rate beginning in calendar year 1983. Absent this additional amendment, the extension rate for calendar 1983 would have remained at 1.61%, and Board would not have received an increase in cash receipts resulting from the tax rate increase until its 1984-85 fiscal year. In essence the "extension rate" increase allowed Board to take immediate advantage of the educational fund tax rate increase described above by collecting taxes that had been levied in the prior calendar year but could not otherwise have been collected. (Stip. 233)

338. Board's projected deficits for fiscal years 1984-85 and 1985-86 included in the 1984-86 Financial Plan derive in part from an Authority directive that Board project educational fund taxes will be collected in calendar year 1984 at a rate lower than 2.11% of equalized assessed valuation. Board believes Authority's position is incorrect because the 2.11% rate should and will be applicable to calendar year 1984 educational fund tax collections. In summary the nature and significance of the disagreement between Board and Authority on this issue is as follows:

(a) Due to the complex nature of Board's tax levy and collection process, there is a lag between the time Board's taxes are levied and the time they are collected. As a result of this lag, certain of Board's taxes cannot be collected until two years after their levy. Amounts of those "levied but unbilled" taxes vary from fund to fund.[32]

(b) In the educational fund, the amount of levied but unbilled taxes was sufficient to permit a "speed-up" of tax collections, authorized by the "extension rate" amendment, of approximately $100 million over and above the amount originally projected for fiscal year 1983-84.[33] As a result of the "speed-up," educational fund taxes are essentially on a cash-current basis. In other words, substantially all taxes levied for that fund in a calendar year (for the fiscal year that begins that year) will be collected in the following calendar year.

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[32] In recent fiscal years Board has taken a series of actions to place its taxes on a more "cash-current" basis and reduce the amount of "levied but unbilled" taxes. Those actions have played a significant role in reducing or eliminating budget deficits originally projected for those fiscal years.

[33] Regulations promulgated by the Authority regarding the definition and determination of a "balanced budget" essentially require that Board's proposed expenditures be supported on a cash basis. Thus the "extension rate" amendment — which generated approximately $100 million in additional cash receipts for fiscal year 1983-84 — had a significant impact on eliminating Board's originally projected budget deficit for this year.

(c) During its consideration of Board's current Financial Plan, Authority took the position the "extension rate" amendment did not authorize the extension of educational fund taxes at the 2.11% in calendar year 1984, but rather mandated a lower maximum extension rate. Under the view expressed by Authority, Board's cash receipts for fiscal year 1984-85 would be approximately $65 million less than what would be generated if the 2.11% extension rate were applicable. Board was required to take Authority's view into account when projecting its receipts for fiscal year 1984-85. As a result, Board's current Financial Plan projects a deficit of approximately $146 million for fiscal year 1984-85 as opposed to the approximately $81 million initially projected by Board.

(d) Board and its counsel are of the view 2.11% is clearly the applicable extension rate for calendar year 1984 and subsequent years. However Board may choose to seek the enactment of confirmatory legislation to address any misunderstanding or confusion that may be thought to exist on this subject. Such legislation would be required before the mailing of the second-half calendar year 1984 tax bill. (Stip. 234)

339. Board and Authority agree that if Board's position as to the applicable educational fund tax collection rate is correct, Board's Financial Plan would still project operating deficits of approximately $81 million for school year 1984-85 and approximately $91 million for school year 1985-86. (Stip. 235)

340. Board does not have sufficient revenues from present sources to cure the projected deficits for school years 1984-85 and 1985-86 (which are based on the assumptions set forth in Finding 335). In fact, it may be virtually impossible for Board to avoid annual financial crises or attain long-term financial stability in the near future. (Bacchus testimony)

341. Because Board's budget and financial affairs are subject to Authority's review and oversight, and because of the intensive and rigorous scrutiny and financial oversight provided by Authority, Board's projections as to operating deficits in future fiscal years are entitled to particular weight and reliabi-

lity. (Stips. 226-27; Bacchus testimony; Glasper testimony; Board Ex. 115)

Board Efforts to Find Resources

342. In June 1983 Board projected a budget deficit for fiscal year 1983-84 of approximately $200 million. That projected deficit was eliminated, in part, as a result of Board's receipt of additional revenues. (Stip. 236)

343. Most significant of the revenue increases that contributed to the elimination of Board's projected deficit for school year 1983-84 were (a) an increase of approximately $100 million in educational fund taxes and (b) an "increase" of approximately $65 million in State distributive fund aid. In fact, almost all of this so-called "increase" represented no more than a restoration of State aid to the level in effect for the prior school year. Also contributing to the elimination of this projected deficit were small increases in miscellaneous revenues and various expenditure reductions effectuated by Board. (Stip. 237; Board Ex. 115)

344. Those increases in educational fund taxes and state distributive fund aid resulted from actions taken by the Illinois General Assembly to (a) increase the maximum tax rate for Board's educational fund and (b) increase the State income tax. (Stip. 238)

345. Board lobbied vigorously in support of both of the legislative measures described in Finding 344. Its lobbying activities included meetings among the General Superintendent, Board members, and members of the General Assembly, and the Governor and his staff. Board also organized rallies and public displays of support for those legislative measures and drafted appropriate amendments to the School Code, which enabled Board to take immediate advantage of the increase in educational fund tax rates. (Bacchus testimony)

346. Board's commitment to increase expenditures for incremental desegregation programs by $10 million is an assumption upon which the projected deficit of $200 million for fiscal year 1983-84 was based. Therefore, Board's efforts to increase its revenues for fiscal year 1983-84 were taken in part to fulfill its commitment to increase its incremental desegregation expenditures. (Bacchus testimony)

347. Since the entry of the Consent Decree, Board has repeatedly sought to obtain funding for desegregation from the State of Illinois. As a part of its efforts, Board has drafted and proposed legislation that would provide desegregation funding for Chicago. Such legislation is also included as a part of Board's legislative program for 1984. To date Board's efforts in this regard have been unsuccessful. (Bacchus testimony)

348. Board's budget for school year 1983-84, as approved by Authority, was balanced only after approximately $23.6 million in expenditure reductions from Board's original proposal (including at least approximately $12.2 million in reductions from the expenditure level for the 1982-83 school year). Proposed desegregation expenditures were not reduced. (Bacchus testimony; Glasper testimony)

349. In the summer and fall of 1983, Board encountered a prolonged dispute with the collective bargaining representatives of its employees, including the Chicago Teachers' Union. This included a three-week strike of Board employees, whose principal demand was for increased compensation. Board employee groups specifically and consistently demanded that Board delete its proposed $10 million increase in desegregation expenditures and devote those funds to increased employee compensation. Board successfully resisted that demand and preserved the proposed increase in desegregation expenditures for its 1983-84 school year budget, thereby complying with Board's previously made commitment and determination as to its level of desegregation expenditures in 1983-84. (Bacchus testimony)

Federal and State Funds Received by Board

350. Board submitted applications for an ESAA grant in fiscal 1981 and for Title IV grants in fiscal years 1980 and 1981 as part of those programs' regular grant review process. Board's 1981 ESAA application was for approximately $23.8 million, and the amount of the grant was $1.8 million. Board's awards of $422,800 in fiscal 1980 and $298,639 in fiscal year 1981 were the largest awards to local educational agencies for race desegregation assistance under Title IV in those years. (Stip. 335)

351. In fiscal year 1983 Board submitted two applications for $9 million and $13 million for funds from the Secretary's Discretionary Fund. Those applications were ranked by the Department of Education 13th and 28th, respectively, out of 34 applications received in the priority area for which they were filed. Only 10 programs were funded. (Stip. 337)

352. ECIA Chapter 2 consolidates, on a block grant basis, several programs for which Board previously received funds on a categorical basis. Among the programs consolidated are: Basic Skills (ESEA Title II); Instructional Materials and School Library Resources (ESEA Title IV-B); Improvement in Local Educational Practice (ESEA Title IV-C); Emergency School Aid (ESAA Title VI); and Teacher Corps (Higher Education Act. Title V-A). As a result, Board receives approximately $5.5 to $6 million annually in block grant funds (allocated and distributed by the State Board of Education) appropriated to finance a variety of educational programs, some of which are continuations of previously funded categorical programs and some of which are newly implemented and established programs. Board is allocating approximately $1.8 million — an amount equal to what it received under ESAA prior to its repeal — of its Chapter 2 block grant to desegregation purposes in fiscal year 1983-84. (Stip. 210; Bacchus testimony; Glasper testimony)

353. Board received federal assistance before the Consent Decree, and continues to receive such assistance today, under the various federal programs referred to by the United States. Together those funds, including ECIA Chapter I, encompass the categorical federal educational assistance received by all school districts in the United States, including Board, for essential basic educational programs. Those funds have been and continue to be received by Board on the basis of criteria that are unrelated to and do not take into account either the Consent Decree or the costs of implementing the Plan. (Glasper testimony; Bacchus testimony; Fagan testimony)

354. Studies and congressional documents reflect the following conclusions as to the impact of the ECIA legislation on urban desegregation:[34]

(a) ECIA Chapter 2 has caused a substantial shift of federal education funding away from urban school districts with high percentages of minority students. In particular, urban school districts implementing voluntary or court-ordered desegregation plans have experienced severe losses in federal aid due to the consolidation of ESAA in Chapter 2 block grants. Those school districts have frequently been unable to find other sources to compensate for these losses and, as a result, desegregation efforts have been significantly hindered. H.R. Rep. No. 98-581, 98th Cong. lst Sess. (1983); Rand Corporation, "The New Federalism in Education" at 52-53, 81-82 (1983) (report prepared for the Department of Education). *See also,* American Association of School Administrators, "The Impact of Chapter 2 of the Education Consolidation and Improvement Act on Local Agencies," at 18-19 (1983); The Council of Great City Schools, "Trends in Federal Funding to Urban Schools" (1983).

(b) Effects of ECIA Chapter 2 on urban school districts with large percentages of minority students are well known to the Secretary of Education. Among the

[34] All references are to documents in Board Ex. 118.

many instances when this matter was called to the Secretary's attention are:

(i) the November 30,. 1983 Report by the House Committee on Government Operations, recommending that ESAA be reauthorized as a categorical program. H.R. Rep. No. 98-581, 98th Cong. lst Sess. (1983);

(ii) the September 29, 1983 hearings before a House subcommittee of the Committee on Government Operations addressing the topic, "Federal Education Assistance: Are Block Grants Meeting the Need?", noted *passim* in H.R. Rep. No. 98-581;

(iii) the July 1983 "Statement on the fiscal year 1984 Education Budget" by the United States Commission on Civil Rights, concluding that "the cutting of ... funds and the placement of ESAA in a block grant in fiscal year 1982 has limited the nation's efforts to provide equality of educational opportunity for all students." (Statement at 45, reprinted in H.R. Rep. No. 98-581, at 16);

(iv) the June 28, 1983 letter from Senators Eagleton and Stafford, requesting the Department's position on S.1256, a bill "to authorize special assistance for desegregation activities," and noting several reports discussing the damaging effects of Chapter 2 on school districts undergoing desegregation;

(v) the February 1983 report prepared by the Rand Corporation for the Department of Education entitled "The New Federalism in Education;"

(vi) the August 20, 1982 letter from John Hope, Staff Director of the Civil Rights Commission, to the Secretary, expressing concern that the Department's approval of States' allocation formulas without adequate standards would "drain funds from inner-city schools where minority children are concentrated, and drastically reduce support for voluntary desegregation effort." (Reprinted in H.R. Rep. No. 98-581 at 21);

(vii) the July 2, 1982 letter from the Council of Great City Schools and the Lawyers' Committee from Civil Rights Under Law to the Secretary, expressing concern that the Department's decisions with regard to state formulas were contrary to Congressional

intent and were resulting in inadequate funding to urban school districts, particularly those undergoing desegregation. (Reprinted with the statement of Samuel Husk at the House Subcommittee on Civil and Constitutional Rights Hearing on Civil Rights Implication of the Education Block Grant Pro- gram, 97th Cong., lst Sess. (1982).

(c) ECIA requires that the Secretary approve the criteria used by States to develop formulas to distribute funds to LEA's only when these criteria "are reasonably calculated to produce an equitable distribution of funds" with reference to the adjustment factors for high-cost children. 20 U.S.C. §3815. Depite his knowledge of the effects of Chapter 2 of the ECIA on urban school districts undergoing desegregation, the Secretary has not attempted to assure the equitability of distribution formulas. He has refused to provide SEA's with standards for developing their formulas by defining the term "equitable" by regulation and has intervened to change formulas only to prevent allocation plans weighted for desegregation funding. *See* H.R. Rep. No. 98-581, at 20.

355. Despite knowledge of the harmful impact of Chapter 2 of the ECIA on urban school districts undergoing desegregation (and in particular Chicago), the Secretary has opposed efforts to re-enact ESAA or otherwise authorize special assistance for desegregation activities. (Secretary Bell's letter to Sen. Hatch, October 18, 1983, in Board Ex. 118)

356. Amounts received by Board in school years 1978-79 through 1983-84 from the Department of Education under Chapter 1 of the ECIA and the antecedent program to Chapter 1 (Title I of the Elementary and Secondary Education Act of 1965) are as follows:

School Year	Amount (millions)
1978-79	$56.096
1979-80	67.332
1980-81	63.650
1981-82	59.912
1982-83 1983-84	73.247

(Stip. 338)

357. It is not the United States' contention that it was the "reasonable expectation of the parties at the time of signing the Consent Decree" that Chapter 1 (formerly ESEA Title I) funds to which Board was already entitled would constitute all or part of the United States' contribution to funding the Plan. There was no consideration or discussion of this subject at that time. (United States' Answers to Board's Sixth Interrogatories, No. 1.) No basis exists for finding such an expectation.

358. Chapter 1 is intended to serve the lowestachieving children within a particular attendance area. Its statutory scheme is race neutral. It is a scheme that targets funds to schools with the highest concentration of low income children who are Chapter 1 eligible. Within a school eligible for Chapter 1 funding, however, the selection of children to be served by Chapter 1 programs is determined by achievement level, regardless of an individual child's poverty. (Fagan testimony)

359. In educators' terms an educationally deprived child is a child whose achievement is below the average achievement level for children of the same age. For children like those attending the Chicago public schools, whose achievement is measured by the Iowa Testing Battery, educational deprivation refers to achievement scores below the 50th percentile. Black and Hispanic children are generally lower achieving than their white counterparts when they enter the educational system. That means a greater preponderance of Black and Hispanic children are below the 50th percentile when they enter the educational system, and the preponderance does not change as they progress through the system. (Fagan testimony)

360. It is a goal of the Chapter 1 statutory scheme to move a low achieving child toward grade level and sustain those gains. Removing a child from a Chapter 1 Program would threaten any existing achievement level gains. Removing a child from a Chapter 1 program for the summer could threaten any gains that occurred during the preceding school year. (Fagan testimony)

361. All of the approximately 40% of children in racially identifable schools who are served by Chapter 1 programs were or are projected to fall further behind grade level achievement norms as they progress through the system. They start first grade significantly behind majority and minority children of the same age who are attending the same or other schools. Chapter 1 programs are intended to start those below-grade level minority children closer to other children, and to keep them from falling further behind as they move through the system. (Brady testimony and inference from Fagan testimony)

362. Of the original 45 ESP schools 40 are served by Chapter 1 programs. (Fagan testimony) Of the 62 schools where the full ESP program was implemented in the 1983-84 school year, 55 are served by Chapter 1 programs. Of the 100 schools receiving Level II intervention in school year 1983-84, 42 are *not* served by Chapter 1 programs. (Based on U.S. Ex. 23 and Stip. 151 with accompanying tables)

363. Board's 107 Level I ESP schools have a total enrollment of 80,099, of which 23,048 are served by Chapter 1 programs. Board's 100 Level II ESP schools have a total enrollment of 67,029, of which 10,866 are served by Chapter 1 programs. (Based on U.S. Exs. 23 and 37 and Stip. 151 with accompanying tables)

364. Certain of Board's Educational Components are not eligible for Chapter 1 funding because they are not designed to meet the special educational needs of educationally deprived children, do not serve low-income schools or are central or system-wide in character. (Fagan testimony)

365. Chapter 1 programs and Board's ESP program could work together to provide an extra benefit to Chapter 1 eligible children in terms of closing the achievement gap between Black and Hispanic children and the average achievement level for all children of the same age. (Fagan testimony)

366. Test results demonstrate the Chapter 1 and State Title I programs have only marginally narrowed the initial achievement gap for segregated minority children who begin first grade in racially identifiable schools, and have done no more than marginally reduce the rate by which they fall further behind grade level. (Brady testimony)

367. State Title I funds received by Board as part of its general State aid, including both the systemwide and targeted portions of such funds, are intended to provide resources to Board for the higher costs of providing basic and compensatory education to low income, educationally deprived children. Those funds were already being received by Board at the time the Consent Decree was signed. Consent Decree §2.2 was intended to provide supplemental educational programs, rather than merely to maintain programs then in existence. Simply to shift money from State Title I programs to pay for desegregation programs would eliminate any supplemental character of the desegregation remedy. (Bacchus testimony)

368. Among other goals, the Educational Components were designed (a) to give minority children an opportunity for an equal start after decades of segregation and (b) to assist those already in the system who are behind and falling further behind to catch up. That achievement gap is an obvious pernicious effect of segregation, which any constitutional plan must address with viable programs. Simply to shift money from Chapter 1 and State Title I programs to pay for desegregation programs would eliminate any supplemental character of the desegregation remedy. (Based on Bacchus, Brady testimony)

Board's Good Faith Efforts

369. As of June 30, 1983 Board had already expended approximately $120 million in its efforts to implement fully the various elements and components of the Plan, and had appropriated approximately $67 million for this purpose in school

year 1983-84. Those actions were taken at a time when Board was suffering severe financial constraints and projecting a budget deficit for the 1983-84 school year of approximately $200 million. Moreover, implementation of the Plan had been the most significant area of program expansion in recent school years. In light of these facts, this Court found in Opinion II that from September 24, 1980 to June 30, 1983 Board had made every good faith effort to find and provide every available form of financial resources adequate to pay the costs of full implementation of the Plan. (Findings 3-7, 567 F. Supp. at 274).

370. During the same time period (as of June 30, 1983, when Board had expended $120 million) the United States provided only about $2.5 million in direct desegregation assistance (almost all in fiscal 1981), despite the fact it had substantial additional funds available that it could have provided to Board had it made every good faith effort. (Glasper and Bacchus testimony)

371. Board's good faith compliance with the Consent Decree in its allocation of resources among competing needs has been determined as a factual matter in Opinion II, Finding 3, 567 F. Supp. at 274. That determination was not appealed, and it is the law of the case. Comparable decisions made by Board in its allocation of available resources since June 30, 1983 and for the future also constitute every good faith effort. (Glasper, Brady and Bacchus testimony)

372. In light of the fact the Educational Components of the Plan were intended to provide a supplemental remedy for minority students attending racially isolated schools, Board has sought, from both the United States and the State of Illinois, new resources for the Plan that are supplemental to those already being provided. As an example, Board has succeeded in obtaining a restoration of previously unavailable taxing authority from the State of Illinois. To the extent Board is

unable to obtain new resources, however, Board faces a Hobson's choice between (a) inability to implement the Plan and (b) allocating funds to implement the Plan by shifting existing resources or revenue increments from other educational obligations and priorities. In exercising its narrow areas of choice, Board has made every good faith effort to provide funds, in compliance with the Consent Decree. (Bacchus testimony; Glasper Testimony)

373. Consent Decree §15.1's good faith obligation does not require Board to reallocate unlimited amounts of its general revenues away from basic educational programs to the Plan. Board is in full compliance with the Consent Decree without doing so. Nor does the good faith obligation of the Consent Decree require Board to reallocate more State Title I funds to pay desegregation expenses. Board is in full compliance with the Consent Decree without doing so.

374. Board's decision to allocate approximately $1.8 million of its 1983-84 ECIA Chapter 2 block grant to incremental desegregation expenditures constitutes "good faith efforts" under Section 15.1. (Bacchus testimony)

375. Board's decision to budget approximately $67.7 million of its 1983-84 operating revenues (excluding the moneys appropriated by the Yates Bill) for incremental desegregation expenditures constitutes "every good faith effort" under Section 15.1. Under the present circumstances, a decision to budget such amount of operating revenues for incremental desegregation expenditures would also constitute "every good faith effort" for the 1984-85 school year. (Bacchus testimony; Glasper testimony)

376. In light of Findings 301-75, Board has continued since June 30, 1983 to make every good faith effort to find and provide every available form of financial resources adequate to pay the costs of full implementation of the Plan.

Addendum A to Findings 301-76

State Title I Overview

To understand the relationship between desegregation expenditures and State Title I school aid, an overview of State aid to education in general and of State Title I funding in particular is necessary. Board receives Common School Fund State Aid (often called "general State aid" or "State distributive fund aid"), distributed by the State Board of Education through the Cook County Regional Superintendent of Schools. Amounts so distributed to Board (as well as to other school districts in Illinois) are determined by a mathematical formula set forth in Section 18-8 of the School Code, Ill. Rev. Stat. ch. 122, 18-8. That formula computes the level of State aid to school districts on the basis of each pupil counted in a district's "average daily attendance." Average daily attendance is defined as (a) the sum of all student attendance days reported over certain periods during each academic year divided by (b) the number of days of instruction held during such periods. In computing the amount of such distribution, the State multiplies the average daily attendance of all pupils in grades 9 through 12 by 1.25.

In addition, the formula provides a portion of the Common School Fund State Aid distributed to Illinois school districts is to be based on the number of economically disadvantaged children enrolled in each district. That portion is identified as State Title I aid and is based on the number of "Title I eligible" students in the district, "Title I eligible" being defined pursuant to Chapter I of ECIA (the Education Consolidation and Improvement Act of 1981), formerly Title I of ESEA (the Elementary and Secondary Education Act of 1965). In essence a "weighting" factor is assigned to each Title I eligible student counted in a school district's average daily attendance so that each Title I eligible student "counts" as more than one student for purposes of the average daily attendance formula described above. Ill. Rev. Stat. ch. 122, 18-8.1(n)

State Title I aid (and other forms of financial assistance similar in nature and purpose to State Title I aid) has been received by Board since approximately 1968. Before the 1979-80 school year, however, Board was not required to direct or "target" State Title I funds in relation to the enrollment of State Title I eligible children. Rather those funds were included as part of Board's general resource base and were expended with other resources (primarily local property taxes and Common School Fund State Aid) to fund system-wide educational programs and services.

In the late 1970s School Code §18-8.6(i)(1) (Ill. Rev. Stat. ch. 122, 18-8.6(i)(1)) was amended to provide that a certain portion (the "targeted" portion) of State Title I aid received by Board was to be allocated to schools in proportion to the number of Title I eligible pupils enrolled, while the remainder (the "non-targeted" portion) was to be allocated to schools in proportion to their total student enrollment. Though these proportions are subject to some minor fluctuation from year to year, the targeted portion of State Title I aid is approximately 55% of the total and the non-targeted portion approximately 45%.

That statutory requirement for targeting State Title I aid was initially implemented for the 1979-80 school year and was applicable to one-third of the State Title I aid received that year. Targeting was applicable to two-thirds of State Title I aid received in school year 1980-81 and became fully applicable to all State Title I aid received in school year 1981-82 (and every subsequent year).

To demonstrate compliance with the statutory targeting requirements, Board annually submitted (and continues to submit) to the State Board of Education a plan indicating the distribution of State Title I aid among all schools in the district and the purposes for which such aid was to be used. In other words, for each school receiving targeted State Title I aid, Board indicated the amount of such aid and the programs

eligible to receive funding from such aid. All those programs were required to be "State Title I eligible programs," as determined by regulations promulgated by the State Board of Education.

In substantially all instances (except as described below for certain desegregation programs initiated in school year 1981-82), the programs enumerated as "Title I eligible" were programs previously established by Board and previously funded from its general resource base (which included local resources and Common School Fund State Aid, including State Title I aid). They were not, by and large, new programs established after the implementation of the statutory targeting requirement. Stated another way, for purposes of complying with the State Title I targeting requirements, Board "attributed" certain of its ongoing educational programs, previously funded from Board's general resource base, as being funded from State Title I aid.[35]

For school years 1979-80 and 1980-81 Board was able to comply with the statutory targeting requirement without any reallocation of State Title I aid among schools within the district. However, in school year 1981-82 Board was required to "reallocate" approximately $17 million of State Title I aid to ensure that a sufficient amount was distributed to schools in proportion to the number of Title I eligible pupils enrolled (i.e,. to ensure that the statutory targeting requirement was complied with). That reallocation resulted in the identification of new programs at those schools that received the "supplementary allocation" of State Title I aid.

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[35] In fact the initial funding source for such programs was and is generally not determinable. Prior to the imposition of the State Title I targeting requirement, all Common School Fund State Aid, including State Title I aid, was included without differentiation in Board's general resource base.

Board Desegregation Expenditures

As Finding 306 reflects, incremental desegregation expenditures are budgeted and accounted by use of three-digit project codes. Those having relevance to State Title I expenditures are "946" and "512".

Project Code 946. As described above, a reallocation[36] of certain amounts of State Title I aid received by Board for school year 1981-82 caused certain schools to receive a larger amount of State Title I funds than they had received in prior years. Schools that received the supplementary allocation of State Title I aid were certain of the schools classified as racially isolated schools pursuant to the Plan.

Board used those "reallocated" State Title I funds in school year 1981-82 to provide one source of funding for programs initially implemented in that year as part of the Plan's Educational Components at those racially isolated schools.[37] Board was not required to use the supplemental allocation of State Title I aid to fund desegregation purposes at these schools. To the contrary, such funds could have been used to implement any one or more of a myriad of "State Title I eligible" programs. However Board, in seeking to provide the necessary funds to implement at least a portion of the program elements of the Plan's Educational Components, chose to use

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[36] Certain 946/947 expenditures are considered to have been funded from "reallocated" State Title I resources in the sense that, as of the 1981-82 school year, such resources would not have been required, pursuant to revised or modified Board staffing formulae, to have been spent at the schools receiving such resources even if such schools had received such funding or portions thereof in prior school years.

[37] Board's other source of funding for those programs was a portion — approximately $10 million — of other general Board resources. Those funds and related programs are identified by "Project Code 163".

the supplemental allocation of State Title I aid to fund certain of its desegregation programs.

Appropriations and expenditures attributable to that supplemental allocation of State Title I funds are designated by project codes 946/947 (946 referring to employee salaries and related expenses and 947 referring to expenses for instructional materials).

Board has continued, in schools years 1982-83 and 1983-84, to use that supplemental allocation of State Title I aid to fund a portion of the Plan's Educational Components. Again the decision to use such funds to support desegregation programs is made by Board, not as required by State law or regulation. As a result of (a) fluctuations in the amount of State appropriations for education, (b) changes in the Common School Fund State Aid formula and (c) changes in the number and attendance area of "Title I eligible" children, the total amount of the supplemental allocation has varied between $15 and $17 million per year (with the amount allocated to each school also changing annually to some extent).[38]

Project Code 512. Desegregation expenditures attributable to Project Code 512[39] are those that relate to components of the Plan initiated during and carried over from Access to Excellence — Board's prior desegregation program. When Access to Excellence was initiated in school year 1978-79, expenditures

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[38] In addition, Board, in school years 1982-83 and 1983-84, has continued to fund implementation of a portion of the Educational Components with approximately $10 million per year of other general Board resources (identified, as described above, by "Project Code 163"). Moreover, in school year 1983-84, Board increased its incremental desegregation appropriations by $10 million (identified by "Project Code 496") — with approximately $8 million of that amount being used to expand the implementation of the Plan's Educational Components.

[39] 512 refers to employee salaries and related expenses and 513 refers to expenses for instructional materials. For convenience, these Findings lump the expenditures collectively as "512".

made under that program were designated as "512" in order to account for them separately.

At its inception, Access to Excellence was a new program — an increment to Board's previously existing level of appropriations and expenditures. Moneys to fund the program were provided from Board's general resource base. Stated another way, the cost of implementating the desegregation programs initiated under Access to Excellence was met by an increase in Board's overall resource base, a reduction in expenditures for other programs or a combination of the two in school year 1978-79 — the year in which implementation was initiated.

When the "targeting requirements" for State Title I aid were implemented beginning in school year 1979-80, Board attributed the funding for various of its previously established and already existing educational programs to State Title I aid. That was done to demonstrate State Title I aid was in fact being used to support programs designed to meet the "educational needs of disadvantaged children." However the imposition of the targeting requirement did not require that new programs be established. Instead Board was required to demonstrate that it was providing a sufficient amount of educational services that the State Board of Education considered as "Title I eligible." Among the programs included in those attributable to "State Title I" aid were the desegregation programs previously initiated under Access to Excellence.

But such attribution was no more than a record-keeping matter. It did not result in the implementation or initiation of new programs. Board merely treated the Access to Excellence programs as being funded from State Title I aid, whereas it had previously made no effort to identify the source of funding for this program. Again the attribution process was undertaken simply to comply with the statutory targeting requirement established for State Title I aid.

In other words, State Title I aid funds attributed to (a) Project Code 512 desegregation programs and (b) other components of Board's general resource base are fungible. Board is simply under a statutory obligation to demonstrate it is providing the requisite amount of "State Title I funded" services at all schools in the system. It may comply with that requirement by attributing the cost of previously established programs to State Title I aid if those programs are considered by the State to be eligible.

Attribution of the funding for those desegregation programs (identified by Project Code 512) to State Title I aid has continued to the current school year. What is significant, however, is that even if those programs were hypothetically eliminated by Board, it is most likely that another previously established and funded program would then be attributed to State Title I aid, so that the funds presently budgeted for those desegregation programs would be available to Board for other purposes.

In summary, the only significance of the relationship between "Project Code 512" desegregation expenditures and the State Title I program is that all desegregation appropriations designated as "512" appropriations are also considered as "State Title I eligible" programs.

Summary

Project Code 512 and 946 expenditures are the only desegregation expenditures that are in some way "attributable" to State Title I aid, as described above. Such "attribution" of "512" expenditures to State Title I funds is simply an accounting or bookkeeping concept used in connection with the need to demonstrate compliance with the statutory targeting requirements. All desegregation expenditures (other than those funded from federal sources) are appropriately attributable to general Board resources. (Board Ans. to U.S. Second Set of Interrogatories; Bacchus testimony)

Availability of Federal Funds To Implement the Chicago Desegregation Plan

Presently Available Funds

401. In fiscal year 1984 Congress appropriated $47,447,000 for five subaccounts within Secretary's Special Programs and Populations account, including the Title IV subaccount. (P.L. 98-139, Title III, 97 Stat. 888; United States' Response to Board's Second Request to Admit, No. 17)

402. In each of fiscal years 1983 and 1984 Secretary allocated $24 million to provide grants through Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§2000c-2—2000c-4. (Opinion II Finding of Fact No. 34, 567 F. Supp. at 277; Stip. 305)

403. There is no duty imposed on Secretary to provide fiscal year 1984 Title IV funds for awards to continuing grantees under multi-year grant contracts. (United States' Response to Board's Second Request to Admit No. 18; Stip. 305).

404. All multi-year awards of Title IV funds are subject to Secretary's regulations at 34 C.F.R. §75.253, which state continuation of these grants is contingent upon Secretary's finding that sufficient program funds are available for these grants and that it is in the best interest of the United States to provide these continuation awards.

405. All fiscal year 1984 funds allocated for the Title IV program are currently unobligated. Secretary has notified all applicants for (and his selected recipients of) 1984 Title IV funds that all grant awards are contingent upon the outcome of the present litigation. (48 Fed. Reg. 56254, 56255, December 20, 1983)

406. For fiscal year 1982 and subsequent years, the Department of Education determined the appropriation avail-

able under Title IV of the Civil Rights Act of 1964 would be used for desegregation assistance centers (DACs) and state education agencies (SEAs), rather than direct grants to local education agencies and training institutes. (Stip. 336)

407. In fiscal year 1983 Secretary provided no Title IV funds directly to local educational agencies through the grant program authorized at 42 U.S.C. §2000c-4. (Harrison Dep. 26, 35-36; United States' Response to Board's First Request to Admit, No. 15; Christensen testimony)

408. Many of the inservice and advisory programs in Board's Educational Components were (with regard to federal fiscal year 1983 funds) and are (with regard to federal fiscal year 1984 funds) eligible for Title IV race and national origin desegregation assistance through the program authorized at 42 U.S.C. §2000c-4. (42 U.S.C. §2000c; 34 C.F.R. §§270.03; 270.04, 270.06; inference from Harrison Dep. 65-66; Brady testimony.)

409. Secretary has approved advisory, staff development and inservice training programs for Title IV funds where they contribute, develop or disseminate information or skills that materially assist in the effective implementation of a desegregation plan. Secretary has approved training, staff development and advisory services for Title IV funds where he finds they are related to and materially assist in implementing a desegregation plan. (Board Ex. 72, Decision Memoranda Nos. 137, 123, 114, 90, 49, 15; Board Ex. 72, Decision Memoranda Nos. 137, 123, 114, 90, 49, 15; Board Ex. 75, Technical Review of Board's 1981 Application for Title IV Assistance; Board Exs. 104, 105, 106, Technical Review of Board's 1980 Application for Title IV Assistance)

410. Secretary has approved inservice training and advisory activities for Title IV funding in connection with programs designed to raise minority pupils' academic achievement where these programs were required educational remedies in a court-

approved desegregation plan and were supplemental to a school district's pre-existing compensatory education or basic skills programs. (Harrison Dep. at 66)

411. Secretary has also approved for Title IV funding inservice training and advisory activities in connection with programs designed to raise minority pupils' academic achievement, where the inservice and advisory activities were specifically directed toward educational techniques or instructional strategies to teach minority pupils effectively. (Harrison Dep. 65)

412. Secretary's 1981 Decision Memoranda, which constitute his notices of the amount and purposes for which Title IV grant awards were made to local educational agencies, accurately describe the types of programs or activities for which Secretary makes Title IV funds available. (Board Ex. 72)

413. In fiscal years 1980 and 1981 Board applied for and received Title IV grants in the amounts of $422,800 and $298,639, respectively. Secretary approved those grants, based upon the inservice and advisory programs described in Board's applications, for activities in connection with the planning and initial implementation of Board's Educational Components. In both fiscal years 1980 and 1981 Secretary found that all inservice and advisory programs for which Board sought Title IV funds, as described by Board in its applications, were activities authorized for Title IV assistance. (Board Exs. 73, 74, Board's 1980 and 1981 Applications for Title IV Application; Board Ex. 75, Review of Board's 1981 Application for Title IV Assistance; Board Exs. 104, 105, 106, Review of Board's 1980 Application for Title IV Assistance; 1980 Decision Memoranda No. 37)

414. In providing Title IV grants to local educational agencies through the program authorized by 42 U.S.C. §2000c-4, Secretary has not since 1978 held grant award competitions. (43 Fed. Reg. 111676, 11677 and 11686, March 20, 1978; 43

Fed. Reg. 32372, 32379, July 26, 1978). Instead Secretary has made Title IV assistance available at various times throughout each such fiscal year on an application-byapplication basis. (*Id.;* 34 C.F.R. §270.74(a)) Funding decisions with respect to individual applications for Title IV funds were made as applications were received. (*Id.;* Harrison Dep. 61) No numerical criteria were used to evaluate individual applications, and no rank ordering of applications was made. Secretary made only a recommendation to accept or reject a particular application for Title IV funds on the basis of the selection criteria specified at 34 C.F.R. §270.74(b)(1)-(5). (*Id.;* Harrison Dep. 61, 63; Board Ex. 75, Technical Review of Board's 1981 Application; Board Exs. 104, 105, 106, Technical Review of Board's 1980 Application)

415. Secretary has in the past promulgated Title IV regulations pursuant to his statutory authority to consider "other relevant factors" in awarding Title IV funds, 42 U.S.C. §2000c-4. (See *e.g.*, 40 Fed. Reg. 12346, 12350, §180.44, March 17, 1975)

416. Certain provisions of Secretary's Education Department General Administrative Regulations ("EDGAR"), including the provisions at 34 C.F.R. §75.105 that permit him to establish program priorities, competitive preferences and absolute preferences, apply to the Title IV grant program. (34 C.F.R. §75.1; 75.2, 270.02(e))

417. In each of fiscal years 1983 and 1984 Congress appropriated $28,765,000 for Secretary's Discretionary Fund, 20 U.S.C. §3851. (Stip. 309; United States' Response to Board's First Request to Admit Nos. 29, 31; United States' Response to Board's Second Request to Admit No. 23; P.L. 98-139, Title III, 97 Stat. 888) Of this sum, Secretary is required to use $10,725,000 to fund the statutorily mandated programs specified in 20 U.S.C. §3851(b). (United States' Response to Board's Second Request to Admit No. 11) Secretary was authorized in fiscal years 1983 and 1984 to spend the remaining

$18,040,000 reserved for Secretary's Discretionary Fund for the purposes or programs specified in 20 U.S.C. §3851(a). (Christensen testimony)

418. That sum of $18,040,000 appropriated to Secretary's Discretionary Fund in fiscal year 1984 is currently unobligated. Secretary has notified all applicants for (and his selected recipients of) those funds that their availability to finance grant awards is contingent upon the outcome of the present litigation. (49 Fed. Reg 7551, February 29, 1984; 49 Fed. Reg. 2462, January 19, 1984; 48 Fed. Reg. 50919, November 4, 1983; Board Ex. 76, Letter from William Hopkins to Robert McErath)

419. As indicated in the grant contracts, all multi-year awards of discretionary funds are subject to Secretary's regulations at 34 C.F.R. §75.253, which state that continuation of these grants is contingent upon Secretary's findings that program funds are available for these grants and that it is in the best interest of the United States to make these continuation awards. (Board Ex. 107, exemplary grant contracts)

420. Secretary usually applies the EDGAR provisions relating to the selection of projects for funding after a rank ordering of all applications for grants from the Discretionary Fund. However, Secretary makes the final selection of those applications for funding, and he may change the order in which applications will be funded based upon any information in the application, any other information he deems relevant to the program criteria and any priorities he has established to set aside or otherwise use his discretionary funds. Moreover, Secretary's authority to create preferences and priorities subsumes those "competitive" selection procedures. He may use those preferences and priorities to create a program for a single applicant, reserve discretionary moneys for that applicant and thus award discretionary moneys to that applicant without regard to the EDGAR competitive selection criteria. (34

C.F.R. §75.105(e)(3); 34 C.F.R. §75 217(d)-(e); Christensen testimony)

421. Secretary has acknowledged he is not required to use his Discretionary Funds to finance programs as to which reports of House or Senate Appropriations Committees "recommend" or "encourage" such financing. (Board Ex. 60 at 2).

422. Of the sums appropriated in fiscal year 1984 for the nonstatutorily mandated programs within the Discretionary Fund, $4,890,000 was not "recommended" or otherwise "directed" for particular program expenditures by language in Appropriations Committees' reports. (Inference from H.R. Rep No. 422, 98th Cong. lst Sess. 21 (1983); S.Rep. No. 247, 98th Cong. lst Sess. 129 (1983); H.R.Rep. No. 357, 98th Cong. lst Sess. 109110 (1983))

423. In fiscal year 1984 Congress appropriated $47,447,000 generally to the Special Programs and Populations account to finance the following subaccounts: Title IV; Follow Through; Territorial Teacher Training; Aid to the Virgin Islands; Women's Education Equity. (Stip. 304) Particular sums were not statutorily earmarked or allocated for any of those subaccounts. (P.L. 98-139, Title III, 97 Stat. 888; United States' Response to Board's Second Request to Admit No. 17; Christensen testimony)

424. Of the $47,447,000 appropriated in fiscal year 1984 for Title IV and the four subaccounts in the Special Programs and Populations account, $23,447,000 was allocated for those other subaccounts and $24 million was allocated for the Title IV subaccount. (Christensen testimony; Board Exs. 57 and 64)

425. Secretary could legally reprogram into the Title IV subaccount $13,100,000 of the $23,447,000 allocated to the other Special Programs and Populations subaccounts. After such a reprogramming, Secretary could allocate the balance of the appropriation to the other Special Programs subaccount as he would deem appropriate. That remaining balance would

permit Secretary to fund each other Special Programs subaccount at a meaningful level. (Inference from Christensen testimony)

426. No statutes or administrative regulations address Secretary's authority to reprogram funds between subaccounts in an appropriation account. Secretary's reprogramming policies or practices derive from his relationship with congressional appropriations committees and guidelines issued by those committees. (Christensen testimony; Harrison Dep. 138-39)

427. It is Secretary's policy to receive the approval of both appropriations committees' chairmen before effecting a reprogramming of funds. Absent the consent of both chairmen, Secretary will not reprogram funds between subaccounts. (Christiansen testimony)

428. Secretary acknowledges that, notwithstanding this policy, he has the legal authority to reprogram into the Title IV subaccount fiscal year 1984 funds from the other Special Programs and Populations subaccounts after notifying the chairmen of the two congressional appropriations committees of his intention to do so. (Christensen testimony; Harrison Dep. at 138-139; Board Exs. 68, 69). Most significantly for current purposes, however, whether or not Secretary has such legal authority (or whether he views the matter as controlled by practical considerations such as his relationships with Congress), Secretary has made no effort whatever to take steps to reprogram funds to honor the United States' obligations under Consent Decree §15.1 — either by application to Congress or on his own, and either before or since the Court of Appeals' decision "provide[d] the Department an opportunity to fashion its proposed remedy for past non-compliance, as well as a chance to show that it intends to comply in the future ...." 717 F.2d at 385.

429. From 1979 through the present, Secretary formally requested approval from congressional appropriations com-

mittees for sixteen reprogrammings of funds. Eleven of these reprogramming requests were approved and five were disapproved. One of those reprogrammings was designed specifically to provide for a single program (PUSH-EXCEL), which would have been eliminated absent the reprogramming. During the same period Secretary also effected two reprogrammings without seeking congressional approval. (Christensen testimony; Board Exs. 68, 69)

430. As indicated in the grant contracts, all multiyear awards of funds from any of the Special Programs and Populations subaccounts are subject to Secretary's regulations at 34 C.F.R. §75.253, which state that continuation of these grants is contingent upon Secretary's findings that program funds are available and that it is in the best interest of the United States to make such continuation awards. (Board Ex. 107, exemplary grant contracts)

431. All the $23,447,000 allocated to the four Special Programs and Populations sub Title IV) is currently unobligated. Secretary has notified all applicants for (and his selected recipients of) those funds that their availability for grant awards is contingent upon the outcome of the present litigation. (See *e.g.*, 48 Fed. Reg. 53149, November 25, 1983; 48 Fed. Reg. 55898, December 16, 1983)

432. Fiscal year 1982 funds not used by fiscal year 1982 Follow Through and Title IV grantees ("carryover funds") aggregated $1,087,555, consisting of $440,300 in Follow Through funds and 647,255 in Title IV funds. (United States Answer to Board's Second Set of Interrogatories, No. 11) Secretary had the authority to allow the grantees to expend those funds in fiscal year 1983, or to require that grantees return those funds to the United States. However, pursuant to Opinion II, those "carryover" funds were applied by the original grantees to fiscal year 1983 programs. Accordingly an equal amount of fiscal year 1983 funds has been set aside in the Department of Education's accounts. (Stip. 318) That

$1,087,555 in carryover funds is available for expenditure in fiscal year 1984.

433. Board Ex. 88 was prepared by the United States. (United States Answer to Board's Second Set of Interrogatories, No. 9) It sets forth the amount of funds from Department of Education appropriations that lapsed in fiscal year 1981 and 1982. It also shows that $21,188,206 of non-desegregation funds from various Department of Education appropriations would have lapsed in fiscal year 1983, except that those funds were escrowed by this Court. (Stip. 315)

434. "Lapsed funds" are funds appropriated to various nondesegregation programs of the Department of Education that have not been obligated at the end of the fiscal year and that therefore revert to the United States Treasury. Legislation would be required to reallocate lapsing funds and make such funds legally available for and provide them to Board. Secretary may not provide such lapsed funds to any grantee without congressional authorization . Such funds could be allocated to Board for its desegregation activities through a congressional reappropriation. (Stip. 314; Christensen testimony)

435. As represented in the Appendix to the President's Budget for fiscal year 1985, it is estimated that at the end of fiscal year 1984 the following amounts of funds appropriated to the Department of Education will remain unobligated and otherwise lapse:

Bilingual Education	$30,000,000
Higher Education	$ 1,920,000

(Board Ex. 57)

436. Department of Education's Office for Civil Rights enters into contracts with various organizations to provide technical assistance to local educational agencies. That program is intended to assist local educational agencies in complying fully with Title VI requirements. (S. Rep. No. 247, 98th Cong. lst Sess. 163-64 (1983)). It was created by the Office for

Civil Rights pursuant to its authority to make any payments necessary to carry out its compliance and enforcement functions. (20 U.S.C. §3413(c)(3); P.L. 98-139, Title III, 97 Stat. 894)

437. With funds appropriated to the Department of Education's Salaries and Expense subaccount, Secretary has financed program administration activities, including policy analyses, special projects, advisory committee operations and program evaluation contracts. (Board Ex. 57, Appendix to the Budget for Fiscal Year 1985, at I-I22)

438. This Court has not been advised by the United States as to the amount, in funds or other property, currently within Secretary's Salary and Expense subaccount, Office for Civil rights subaccount or Secretary's Gift and Bequest account.

Actions by the United States Affecting the Availabilty of Funds

439. As the following specific Findings in this section reflect, since the entry of Opinion II nearly a year ago — June 30, 1983 — the United States has taken no action to provide presently available funds to Board. Rather it has engaged in conduct designed to render unavailable both existing funds and any future sources of funds that could be used for implementing Board's Desegregation Plan. For over nine months (since the Court of Appeals decided on September 9, 1983 the United States was in direct violation of its obligation under Consent Decree §15.1) that course of conduct has been in direct contravention of the Court of Appeals' granting the United States "an opportunity to fashion its proposed remedy for past non-compliance, as well as a chance to show that it intends to comply in the future ...." 717 F.2d at 385.

440. Secretary has failed or refused to provide to Board any of the previously restrained 1983 funds that became available for distribution to grantees, including Board, pursuant to this Court's November 21, 1983 Order. (Motion of the

United States to Modify the June 30 Order and Supporting Memorandum, filed February 2, 1984; Plan of the United States, filed November 10, 1983).

441. No request whatever for funding for Title IV of the Civil Rights Act of 1964 ("Title IV") was included in the Budget for the Department of Education submitted and proposed by the Executive Branch for federal fiscal year 1984 (the "President's Budget"). (A2-15) (Stip. 302; Board Ex. 57)

442. From the available fiscal year 1984 funds appropriated for the Title IV program, Secretary intends to provide no direct grants of Title IV funds to any local educational agency, including Board. (United States Response to Board's Second Request to Admit, No. 25; Stip. 310; Christensen testimony)

443. As represented in the President's Fiscal Year 1985 Budget, Secretary has requested Congress to appropriate no funds to provide desegregation assistance through Title IV in fiscal year 1985. (Board Exs. 56 (at 107-108) and 57)

444. No request for funding the Women's Educational Equity Program, the Follow Through Program, Aid to the Virgin Islands, and the Territorial Teacher Training Program (collectively "the other Special Programs") was included in the President's Budget for fiscal year 1984. (United States' Response to Board's Second Request to Admit, No. 16; Stip. 303) Those programs are the subaccounts currently subject to Opinion II. (Christensen testimony)

445. Secretary does not intend to reprogram to the Title IV subaccount any fiscal year 1984 funds appropriated for the Discretionary Fund or allocated to the other Special Programs. Section 309 of the ECIA (enacted in 1981) had the effect of limiting to $13,100,000 the amount of fiscal year 1984 funds the Secretary theoretically could reprogram to Title IV. There is no such limit for fiscal year 1985. (Stip. 313)

446. From the available fiscal year 1984 funds appropriated by Congress and allocated to the Special Programs and

Populations subaccounts, Secretary has not reprogrammed and does not intend to reprogram moneys into the Title IV subaccount. (Stip. 313)

447. Finding 429 reflects Secretary's prior efforts toward reprogrammings of funds. Secretary has never sought or requested approval from congressional appropriations committees for a reprogramming of funds to subaccounts from which desegregation assistance could be made available to Board. (Christensen testimony)

448. As represented in the President's fiscal year 1985 Budget, the Executive Branch has requested Congress to appropriate no funds in fiscal year 1985 to the Special Programs and Populations subaccounts currently subject to Opinion II. (Board Ex. 56 at 77)

449. Secretary does not intend to distribute fiscal year 1984 moneys from his Discretionary Fund to any local educational agency for direct operating costs of a desegregation plan. (Stip. 312)

450. Secretary does not intend to set aside federal fiscal year 1984 Discretionary Fund moneys specifically to fund a portion of Board's desegregation program costs. However, Board may submit a competitive application for a project that Secretary considers eligible under the Discretionary Fund. (United States' Response to Board's Second Request to Admit, No. 27) Should such an application be favorably considered by the Department, it is unlikely that Board would receive an award of more than $75,000 to $175,000. (Stip. 311)

451. Secretary intends in fiscal year 1984 to distribute all moneys appropriated to the Discretionary Fund only for the statutorily mandated programs specified at 20 U.S.C. §3851(b) or to support projects or activities that Secretary determines will further a national educational priority or need. (Board Ex. 57; Justification of Appropriations Estimates for Fiscal Year 1984 at 50; United States' Answer to Board's Fifth

Set of Interrogatories, No. 2; 49 Fed. Reg. 7546, February 29, 1984) Secretary will not provide from his Discretionary Fund a direct grant of financial assistance to a local educational agency, including Board, for the costs of implementing a desegregation plan. (United States' Answer to Board's Fifth Set of Interrogatories, No. 5; Christensen testimony)

452. On February 29, 1984 Secretary promulgated proposed regulations establishing eligibility criteria for local educational agency grants from the Discretionary Fund. (49 Fed. Reg. 7546, February 29, 1984) As described in those proposed regulations, Secretary's policy is not to provide discretionary funds to meet "local needs." Secretary defines a program that meets a "local need" for purposes of awarding Discretionary Fund moneys as any program that is also authorized for financing under ECIA Chapter 2, 20 U.S.C. §3821. Those regulations also describe Secretary's policy to distribute Discretionary Fund moneys pursuant to 20 U.S.C. §3851(a)(4) only to provide technical assistance to a local educational agency. Applying that regulatory policy, Secretary would find that the programs and program elements making up Board's educational components do not qualify for Discretionary Funds in fiscal year 1984 and in future fiscal years. (United States' Answer to Board's Fifth Set of Interrogatories, No. 5; Board Ex. 87)

453. Included in the President's fiscal year 1985 Budget is a requested appropriation of $43,224,000 for Secretary's Discretionary Fund for fiscal year 1985. (Board Ex. 56, Justifications of Appropriations Estimates for Fiscal Year 1985 at 77, 94; Board Ex. 57) Secretary intends to use $31,599,000 of that amount for the nonstatutorily mandated purposes or programs specified in 20 U.S.C. §3851(a). His intended uses do not include financing Board's desegregation activities.

454. No fiscal year 1981, 1982 or 1983 lapsed funds have been provided by the United States to Board for the Plan. Nor

has the United States sought, nor does it currently intend to seek, legislation to provide such funds to Board. (Stip. 316)

455. Secretary does not currently intend to take any steps to provide to Board, for the purpose of financing its desegregation activities, any fiscal year 1984 or later year funds that otherwise will lapse in such years. (Stip. 317)

456. In addition the United States has not provided any of the "carryover funds" identified in Finding 432 to Board for implementation of the Plan. Nor has the United States taken, nor does it currently intend to take, steps to provide such funds to Board. (Motion of the United States to Modify the June 30 Order, and supporting memorandum, filed February 2, 1984; Stips. 318, 319)

457. Absent Opinion II, Secretary would have allowed the grantees to expend the 1982 "carryover funds" in 1983 without setting aside a corresponding amount of 1983 funds. (*Id.*)

458. In fiscal year 1984 the United States has not sought authorizing legislation or a specific appropriation to finance all or any part of Board's cost of implementing its desegregation plan. (Plan of the United States filed November 10, 1983: Report of the United States filed July 14, 1983)

459. In the President's fiscal year 1985 Budget, the Executive Branch did not propose authorizing legislation or a specific appropriation to finance all or any part of Board's cost of implementing its desegregation plan. To the contrary, in that budget the Executive Branch is seeking specific legislation to make all funds appropriated to the Department of Education unavailable for Board. (Board Ex. 57 at I-124 §309). That proposed legislation is intended to make all funds, other than those specifically appropriated for that purpose, unavailable to Board for use in implementing its Desegregation Plan. Inclusion of that proposal within the 1985 Budget is consistent with the policy of the Executive Branch of the United States to

deny funding to Board for desegregation implementation. (Christensen testimony)

460. Secretary can include, in the President's budget requests to Congress, budgetary line items that request Congress to provide funds for particular purposes, activities or programs that Secretary has not previously undertaken. Such a request for funds is known as a "nonauthorized line item" or a "nonauthorized program." It is Secretary's practice to transmit authorizing legislation for such a line item simultaneously with the appropriation request. If Congress appropriates funds for and authorizes the use of such a line item, Secretary is authorized to spend funds for that purpose. (Christensen testimony; United States General Accounting Office, *Principles of Federal Appropriations Law* at 2—11, 2—12, 2—26, 2—27 (1983)

461. There is currently a line item (but without any authorized amount) in the President's fiscal year 1985 Budget entitled "Chicago Desegregation Activities." As reflected in the President's fiscal year 1985 Budget, Secretary does not intend to request that Congress provide any funds to this line item in fiscal year 1985. (Board Ex. 57, Appendix to the Budget for fiscal year 1985 at I-Il3; Board Ex. 64, 1985 President's Budget at 2; Christensen testimony)

462. In the President's budget requests to Congress, Secretary can include budgetary line items within grant programs or other types of accounts. Secretary may create such line items to indicate the basis for the appropriation amount requested and the manner in which he intends to allocate funds appropriated to the grant program or account. (Christensen testimony; Board Ex. 56 at 95-96; Board Ex. 58 at 48; Board Ex. 61 at 2, 3; Board Ex. 62 at 2; United States General Accounting Office, *Principles of Federal Appropriations Law* at 2—11, 2 -12, 2—26, 2 -27, (1983)

463. In the President's fiscal 1985 budget, Secretary has not included any such line item in his Title IV, Secretary's

Discretionary Fund or Departmental Management subaccounts that would allow him to reserve appropriated funds for Board's desegregation activities. (Christensen testimony; Board Exs. 56, 57)

464. Federal fiscal year 1984 funds generally will not be expended until the summer of 1984 and, with some exceptions, are primarily for use in school year 1984-85. (Stip. 344)

465. In fiscal year 1984 there are minimal sources and amounts of funds available to the United States to provide desegregation assistance for Board. Those limitations upon the United States' available resources result from its failure perhaps more accurately, its refusal — to seek or make available sufficient funds to meet its Consent Decree obligations. As detailed in Findings 440-63, the United States through Secretary has failed, and most recently has refused, to request from Congress in fiscal years 1982 through 1985 sufficient funds to apply toward Board's desegregation needs. It has not sought to establish funding sources that specifically recognize its Consent Decree obligations and are in addition to those previously created by Congress for desegregation assistance. It did not request sufficient fiscal 1984 appropriations, and has not requested sufficient fiscal year 1985 appropriations, to enable it to meet its Consent Decree obligations, while simultaneously it has provided a significant amount of these funds to otherwise eligible applicants. On behalf of the United States, Secretary has deliberately reduced available funds and created competition between Board and other applicants for the funds from these pre-existing sources.

467. Such limited availability of fiscal year 1984 funds for provision to Board pursuant to the Consent Decree is a direct result of the failures and refusals of the Executive Branch to seek funds for financing the Plan and, even worse, its affirmative efforts to render existing funds unavailable to Board. Those actions, particularly since the Court of Appeals' affirmance of Opinion II's determination that the United States was

in violation of Consent Decree §15.1, constitute further willful violations of the Consent Decree by the United States.

Actions with Respect to the Yates Bill and Weicker Amendment

501. As the following findings in this section reflect, from the first draft of the Yates Bill through the passage of the Weicker Amendment, the Executive Branch intentionally sought to secure passage of legislation that would have earmarked the funds restrained by Opinion II (a restraint upheld by the Court of Appeals, 717 F.2d at 385) to render them unavailable to Board.

502. On August 13, 1983 the President vetoed H.J. Res. 338, a bill sponsored by Representative Yates, the only substantive provision of which was a $20 million appropriation to enable Secretary to comply with the Consent Decree. (Stip. 320)

503. Both the message of the President accompanying that veto (Board Ex. 78) and the subsequent statement of Secretary of Education Terrel Bell (Board Ex. 79) express the official policy of the Executive Branch, including the Department of Education, to take actions designed specifically to render funds for desegregation assistance unavailable for Board. (Chambers Dep. 57-58, 69; Christensen testimony)

504. On or about September 21, 1983, during the mark-up in the House Appropriations Committee of H.J. Res 367 (a continuing resolution designed to provide temporary funding in federal fiscal year 1984 for several federal departments), Representative Yates added Section 111 to the proposed legislation. During the same mark-up Representative Conte added Section 112 to the proposed legislation, a provision intended to "earmark" funds that had been previously restrained by order of this Court and to provide such funds could be received only

by grantees other than Board. Representative Conte's amendment was adopted by the Appropriations Committee. (Stip. 321)

505. Representative Conte's "earmarking" proposal was supported by the Executive Branch. It was intended to render the funds previously restrained by this Court unavailable to Board. Representative Conte's amendment was not adopted by the full House. (Christensen testimony; Chambers Dep. testimony; Board Exs. 78-87 and 89.)

506. On or about September 22, 1983 the House leadership announced that H.J. Res. 367 was overburdened with amendments and would be redrafted. That redraft was H.J. Res. 368 (another continuing resolution), which contained Representative Yates' Section 111 but did not contain Representative Conte's Section 112. (Stip. 322)

507. During Congressional consideration of H.J. Res. 368, Executive Branch officials prepared an alternative to Section 111 in an attempt to secure legislation that would release the restrained funds to grantees other than Board only under certain conditions. Their proposed substitute language (Board Ex. 80) was given by Executive Branch officials to staff members of the House and Senate Appropriations Committees for inclusion in H.J. Res. 368 as a substitute for Rep. Yates' Section 111. That proposed language would have established a contingency fund to satisfy any final court order against the United States resulting from this litigation and would have made all other fiscal year 1983 funds unavailable for this purpose. (Stip. 323; Chambers Dep. 49-50, 60-61) It was prepared by the Department on its own initiative and was given to the respective appropriations committees (after Rep. Conte's earmarking proposal was defeated) as the Department's "preferred" substitute for Representative Yates' Section 111. (Chambers Dep. 61-62)

508. On September 29, 1983 Secretary Bell testified before the Subcommittee on Education, Arts and the Humanities of

the Senate Labor and Human Resources Committee. His testimony included a statement that the Office of Management and Budget had the day before cleared the substitute language referred to in Finding 507, thus indicating official Executive Branch approval of the substitute. (Stip. 324; Chambers Dep. 65-66, 69, 79-81, 131)

509. Before the Congress Executive Branch officials supported the Executive Branch alternative to the Yates Bill (Stip. 330) and officially opposed the enactment of the Yates Bill. (Chambers Dep. 62 *et seq.*)

510. On October 1, 1983 the President signed into law H.J. Res. 368 (which included Section 111, the "Yates Bill", appropriating $20 million to enable Secretary to comply with the Consent Decree). (P.L. 98-107) Unlike H.J. Res. 338, sponsored by Representative Yates, which had been a free-standing bill dealing only with funding Board's Plan to the extent of $20 million (so that the President could and did veto the measure without affecting other legislation), H.J. Res. 368 covered a host of temporary funding items of an emergency nature, so that a veto would have impacted the operations of many other federal departments. Consequently the President's signing of H. J. Res. 368 did not at all indicate the Executive Branch had altered its opposition to providing any funds to Board to honor the United States' obligations under the Consent Decree.

511. On the contrary, as the following Findings reflect, after the Yates Bill thus became law the Executive Branch continued its efforts to secure passage of a statute specifically designed to render unavailable to Board any funds other than those appropriated for it by the Yates Bill. Those efforts clearly represented a violation of the United States' duties under Section 15.1 as declared by the Court of Appeals.

512. H.R. 3913, the Labor, Health and Human Services and Education Appropriations Bill for fiscal year 1984, was

considered in the Senate October 4, 1983. During Senate consideration Senator Weicker proposed first his original and then his modified amendment (Sec. 308) to H.R. 3913. On October 4, 1983, but sometime before the introduction of Senator Weicker's proposals, a staff member of the Senate Appropriations Committee requested technical assistance from the Department of Education in preparing legislative language to ensure that funds, other than those appropriated in Section 111 of P.L. 98-107, would not be available to fund the Consent Decree. In response to that request the Department of Education prepared and transmitted two alternatives to the staff member (Board Ex. 82), the second of which alternatives was proposed by Senator Weicker as amendment number 2277:

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 other than those appropriated by Section 111 of the Public Law 98-107 shall be available to fund the Consent Decree of 1980 between the United States and Board of Education of the City of Chicago.

Cong. Rec., S. 13506. Although the Senate adopted that amendment, it was later withdrawn and the language of the first alternative (which became Section 309 of P.L. 98-139) was adopted by the Senate later the same day. As enacted, the Weicker Amendment reads:

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provision of the order entered by U.S. District Court for Northern District of Illinois on June 30, 1983: Provided, that the Court's decree entered on September 24, 1980 shall remain in full force and effect.

(Stip. 326; Chambers Dep. 66-69; Christensen testimony)

513. Also on October 4, 1983 Representative Conte presented an amendment to H.R. 3959 that would have earmarked fiscal year 1983 funds in the "Special Programs" account. *Cong. Rec.* H7973. On October 5, 1983 Representative Conte described that amendment as being the one he had

proposed in conjunction with H.J. Res. 367 but stated that he was not going to propose it "[B]ecause the Senate added an amendment dealing with this subject during their floor consideration of [H.R. 3913] ..." (H8017). (Stip. 327)

514. As already found, the Department of Education (through Steven Winnick, Esq. of its Office of General Counsel, and its Director of Budget Services) prepared and conveyed the language originally proposed by Senator Weicker. (Chambers Dep. 66-69; Christensen testimony) It specifically designed that language to render all restrained fiscal year 1983 and 1984 funds unavailable to Board to finance its desegregation activities. (Chambers Dep. 69; Christensen testimony)

515. On or about October 13, 1983, in response to requests for technical assistance from staff members of the House Appropriations Committee who were preparing for the conference committee on H.R. 3913, the Department of Education prepared substitute bill language for Senator Weicker's Amendment number 2277, possible report language for inclusion in the Conference Committee Report and a paper entitled "Talking Points," and it transmitted all three items to members of the Conference Committee. (Board Exs. 83-85; Stip. 328; Chambers Dep. 72-73, 76, 84, 91-92)

516. All three items referred to in Finding 515 were specifically drafted and intended by the Department to render funds unavailable for implementing Board's Desegregation Plan. (Chambers Dep. 72-73, 76-79, 85-87) During the current hearings before this Court, representatives of the Department of Education sought to portray themselves as wholly passive respondents to requests from Congress for technical assistance, implicating no substantive or policy judgments by the Department. That may well be the usual function of the Department in connection with possible legislation, but in light of the foregoing Findings it is totally disingenuous in the present instance. This Court does not credit such testimony and finds it additional confirmation of the findings made elsewhere as to the bad faith of the United States.

517. In the October 20, 1983 Congressional Record there is an extension of remarks by Representative Conte concerning the modified Weicker Amendment (H8470). That statement was adapted by Representative Conte's staff from the materials supplied by the Department of Education referred to in Findings 514-16 and that constitute Board Exs. 83-85. (Stip. 329)

518. In taking the actions described in Findings 502 through 517, the Executive Branch and the Department of Education did not give heed to the United States' Consent Decree obligations, nor did they inform congressional staff of those obligations. (Chambers Dep. 59, 69, 72-79, 91, 107-08, 111-14, 147-48; Christensen testimony) In taking those actions, the Executive Branch and the Department of Education actively supported and sought passage of legislation specifically designed to render funds unavailable to Board. It is a policy and priority of the Executive Branch and the Department of Education to make all funds appropriated to the Department unavailable to Board for implementing its Plan and to oppose specific congressional appropriations of funds to be used to comply with the Consent Decree. Moreover, it has been and continues to be the policy of the Executive Branch to deny funds to Chicago for desegregation implementation.

The United States' Non-Compliance With Section 15.1

601. Since this Court issued Opinion II on June 30, 1983 and the Court of Appeals decided the appeal from Opinion II on September 9, 1983, it has been a policy of the Executive Branch of the United States, including the Department of Education, to disable itself from complying (a) with Opinion II and subsequent orders and (b) with the Court of Appeals' opinion, and to deny funding to Board for desegregation implementation. Those actions constitute more than a failure to "make every good faith effort" to meet the United States' Consent Decree obligation. Rather the United States has actively and willfully ignored the orders of this Court and the

Court of Appeals and has continued its bad faith efforts to evade and undermine its obligations under Section 15.1, by engaging in conduct intended specifically to render existing and future sources of funds unavailable for desegregation assistance to Board. These findings are compelled by the earlier Findings and by the later Findings in this section.

602. As early as the filing of its July 15, 1983 Report, the United States clearly indicated that despite its previously adjudicated liability it had no intention of altering its prior course of bad faith conduct. That Report was supposed to discuss the specific steps to be included in the United States' program of compliance with Opinion II. Instead the United States simply reiterated its prior position it would not treat any funds over which Secretary had control as "available," nor would it seek legislative or other action to render other funds available to Board. That Report alone reflected continuing bad faith on the part of the United States, as well as a willful violation of the Consent Decree and Orders of this Court.

603. Following the Court of Appeals' September 9, 1983 vacation of this Court's previously-ordered remedies, explicitly stated by the Court of Appeals as intended to give the United States an opportunity to "fashion its own proposed remedy," the United States submitted the "Plan of the United States for Supporting the Desegregation Plan of Board of Education of the City of Chicago." That Plan, filed November 10, 1983, sets forth all the actions the United States intends to take in school year 1983-84 and for the duration of the Consent Decree to comply with its obligations under Section 15.1. (Stip. 331-32) Although purporting to satisfy the Seventh Circuit's mandate, the Plan asserted the United States had no further obligations for fiscal year 1983, or for future fiscal years, beyond the $20 million that had been appropriated by Congress as part of a continuing joint resolution covering a number of needed funding appropriations (after the President had vetoed an earlier free-standing provision sponsored by Representative Yates that

would have budgeted funds only for Board and its Plan). Indeed the United States' "Plan" contained no suggestions for remedying the United States' past violations or for meeting its present and future obligations under the Consent Decree, but instead it presented both old and new excuses for the failure to take such actions. It reiterated arguments that had previously been rejected by this Court and the Court of Appeals. Rather than the United States availing itself of the opportunity presented by the Court of Appeals or acting in good faith pursuant to the Consent Decree, its "Plan" and its actions taken (and not taken) pursuant to its provisions constitute bad faith conduct of the United States. Both the Plan and such action and inaction also constitute willful violations of the Consent Decree and orders of this Court and the Court of Appeals.

604. Although the United States received the original version of Board Ex. 28 on or about September 16, 1983, that extensive document was not reviewed by any officials of the Department of Education, other than counsel, until approximately March 1, 1984 — when these hearings forced such a review. (Stip. 301; Fagan testimony; Christensen testimony; Chambers Dep.)

605. All the conduct of the United States detailed under the caption "Actions by the United States Affecting the Availability of Funds" (Findings 439-67), including its promulgation of regulations and proposals of legislation intended to render funds unavailable to Board for use in implementing the Plan, together with its prior failure and present intention not to (a) provide Board with any of the presently or previously restrained funds, (b) seek reappropriation of any excess or "lapsing" funds, (c) seek to identify and provide any other available funds or (d) seek to render sufficient funds available through appropriation requests and other legislative activities, constitutes both bad faith conduct and willful violations of the Consent Decree and orders of this Court and the Court of Appeals.

606. All the conduct of the United States detailed under the caption "Actions with Respect to the Yates and Weicker Bills" (Findings 501-518), specifically designed to render presently available funds unavailable, also constitutes both bad faith and willful violations of the Consent Decree and orders of this Court and the Court of Appeals.

607. All the conduct of the United States referred to in Findings 401-606 was intentionally undertaken by, at the direction of, or with the knowledge of, Secretary of Education Terrel R. Bell, other policy level officials in the Department of Education (including Sally Christiansen, Gary Bauer, Hunter Harrison and Steven Winnick) and other Departments of the Executive Branch. Each of those officials was aware of the Consent Decree and orders of this Court and the Court of Appeals when engaging in that conduct.

608. In sum, despite prior findings and opinions of this Court and of the Seventh Circuit, the United States has shown no intention of complying with Section 15.1 of the Consent Decree. It has refused to make any serious effort to address its obligations and has persisted in its efforts to ensure that funds adequate for financing the Plan are unavailable to Board.

609. All the actions of the United States since Opinion II (and particularly since the Court of Appeals' September 9 opinion) wholly fail to meet its obligation to "make every good faith effort" and constitute affirmative bad faith conduct and willful violations of the Consent Decree and orders of this Court and the Court of Appeals.

CONCLUSIONS OF LAW ("Conclusions")

Law of the Case

1. "Law of the case" has two aspects:

(a) Courts will not normally reexamine their own decisions made at prior stages of the same proceedings, absent special circumstances such as a change in the

relevant law since the last decision, the development of new and compelling evidence or "manifest injustice." This aspect of the doctrine is a self-imposed (hence non-binding) prudential limitation. *See* 1B *Moore's Federal Practice* 0.404[4.-1].

(b) Lower courts must comply with the mandates, and apply the decisions, of reviewing courts on remand. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982). "Decisions" of a reviewing court include any issues decided by that court explicitly or by necessary inference, *Doe v. New York City Department of Social Services*, 709 F.2d 782, 788 (2d Cir. 1983); *E.E.O.C. v. International Longshoremen's Association*, 623 F.2d 1054, 1058 (5th Cir. 1980).

3. Where there are alternative factual or legal grounds for a District Court decision, and the Court of Appeals considers only one, the other grounds are not deemed "decided" (accepted or rejected by implication) for purposes of the second branch of law of the case. Those alternative grounds do remain the law of the case in the District Court under the first branch of the doctrine. *See, e.g., Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir. 1982); *Johnson v. Board of Education of the City of Chicago*, 664 F.2d 1069 (7th Cir. 1981), *vacated* 102 S. Ct. 2223 (1982); 1B *Moore's* ¶ 0.404 [4.-3].

4. Because the following propositions were finally and explicitly decided by our Court of Appeals, under the mandate aspect of the law of the case, they are not subject to reexamination by this Court:

(a) Section 15.1 imposes a substantial obligation on the United States to provide available funds to Board (717 F.2d at 383).

(b) The United States demonstrated a lack of good faith, violating its obligation to Board under Section 15.1, by failing to provide Board with funds it had available for use by Board (*id.*).[40]

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[40] This conclusion may have been subject to reexamination if this Court were unable to "verify" the availability of funds (*id.* at 383 n.8). These Findings and Conclusions have foreclosed that possibility.

(c) Temporarily freezing the obligation or expenditure of available funds pending the outcome of these proceedings was necessary to protect Board's interest by preserving the status quo, and was not an abuse of discretion (*id.* at 385).

4. This Court's finding that Board has made every good faith effort to find and provide every available form of financial resources was not challenged on appeal (*id.* at 380 n.1) and also must be considered conclusively decided. *Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir. 1982). Even were that not so, these Findings and Conclusions have reconfirmed Board's compliance.

5. Several other issues must be deemed conclusively decided by implication as a result of our Court of Appeals' decision:

(a) The Government argued extensively on appeal that the approximately $90 million it had provided to Board under Chapters I and II of the ECIA satisfied its obligation. By accepting that Board had made every good faith effort to find and provide funds for the Plan and nevertheless concluding that the United States had violated its obligation, the Court of Appeals implicitly rejected that argument.

(b) This Court's basic understanding and analysis of the obligations contained in Section 15.1 was at least implicitly approved when employed by the Court of Appeals. Both this Court and that Court undertook an examination of whether funds were available to the Executive Branch that could have been provided to Board had the United States used good faith efforts. Implicit in this examination was an understanding that the United States had an obligation that was not dependent on Board's having exhausted all of its available resources, and that was not dependent on Board's being unable to finance the Plan. By finding a Consent Decree violation while vacating conclusions concerning the cost of the Plan, Board's resources and its need for additional financing, the Court of Appeals necessarily concluded that the failure to provide available funds was a violation independently of whether additional financing was needed or whether Board could theoretically provide it.

6. Opinion III contains no explicit or implicit determination or rejection of the propriety of this Court's detailed exposition (in Opinion II App. A Par. 1, 567 F. Supp. at 286-88) of the United States' obligations under Section 15.1, including, where necessary, legislative initiatives. Also none of the particular remedial obligations of the United States defined by this Court (*id.* Par. 2, 567 F. Supp. at 288) were rejected or considered by Opinion III other than as premature. Rather our Court of Appeals vacated the remedial portions of this Court's Order on the alternative and independent grounds that the United States should be given an opportunity voluntarily "to fashion its proposed remedy for past noncompliance, as well as a chance to show that it intends to comply in the future...." Through the United States has now been given ample opportunity, it has failed — really refused — to propose even a remotely acceptable "remedy" (Finding 603). To the extent the United States is now in a position identical to its earlier position, except for having been given an appropriate opportunity to comply voluntarily with its obligation and having failed and refused to do so, this Court's earlier conclusions as to the scope of the obligations contained in Section 15.1 and the nature of the United States' remedial obligations remain valid. To that extent, those conclusions are the law of the case.

7. In particular this Court has reviewed each of its Opinion II Findings of Fact and Conclusions of Law. That portion of Conclusion 4 that found Section 15.1 unambiguous was a "harmless error" (717 F.2d at 382), and this Court's Findings and Conclusions as to the amount adequate for implementation of the Plan and the remedial obligations of the United States were vacated as premature. With those exceptions, each of the Opinion II Findings and Conclusions remains the law of the case. Moreover, now that the remedial issues are no longer premature, the Conclusions concerning remedies are also law of the case.

8. Many of the Opinion II Findings and Conclusions are first-branch (prudential) law of the case. Thus this Court is not barred from re-examining such earlier determinations, particularly those with regard to the scope of the obligations contained in Section 15.1 and the nature of the United States' remedial obligations. Considering the importance of the issues presented in this case, the presentation of further extensive evidence and certain legislative developments discussed below, this Court has re-examined each of its Opinion II Findings and Conclusions, as well as its contemporaneous Order. Upon examination of the additional evidence and legislative developments, this Court concludes there are no compelling circumstances requiring such reconsideration. Nonetheless, in the interest of generating a self-contained document, new Findings and Conclusions concerning many of the same issues have been presented in this opinion. That does not mean any failure to restate all the prior Findings and Conclusions should be taken as a disavowal. To the contrary, each prior Finding and Conclusion, except to the extent inconsistent with these Findings and Conclusions, remains the opinion of this Court.

9. Two primary issues were not previously decided and were the focus of the hearings beginning March 19, 1984:

(a) "the level of funding adequate for full implementation of the Plan" (Order 6, 576 F. Supp. at 290); and

(b) the present remedial obligations of the United States (*see* 717 F.2d at 385 n.12).

Standards for Determining the Amount of Funding "Adequate for Implementation of the Plan"

10. Much of the ground traveled by courts attempting to determine and allocate the total cost of desegregation plans in more typical desegregation cases has already been covered by the parties and this Court in this case. In particular, the following critical conclusions have previously been established:

(a) Board's obligation is explicitly defined by the Consent Decree: to develop and implement a system-wide

plan to remedy the effects of past segregation (Consent Decree §1).

(b) Thereafter the Consent Decree explicitly describes the nature of the Plan, and particularly the Educational Components, necessary to meet that obligation.

(c) Board's Plan has already been approved by this Court (Opinion I, 554 F. Supp. 912)) and enthusiastically endorsed by the United States.

(d) As discussed throughout these Conclusions, the Consent Decree itself explicitly aliocates the funding responsibilites of the parties.

11. In any determintion and allocation of the appro- priate level of funding for a desegregation plan, the costs of programs that "materially aid the success of the overall desegregation effort" are properly included. *Arthur v. Nyquist,* 712 F.2d 809, 813 (2d Cir. 1983), *cert. denied sub nom. Griffin v. Board of Education,* 52 U.S.L.W. 3756 (U.S. Apr. 16, 1984); *Liddell v. Missouri,* No. 83-1957, slip op. at 51 (8th Cir. Feb. 8, 1984) ("Liddell III"). That involves drawing a line that excludes the mere discharge of a school board's "general educational responsibilities," a line that "inevitably blurs," *Arthur,* 712 F.2d at 813. In striking a balance, a district court should give "considerable deference to the good faith representations of the school authorities." *Id.; Liddle III,* slip op. at 51. Such discretion normally afforded a local board is particularly appropriate in the circumstances presented in this case because:

(a) Section 3.1 provides Board shall have substantial discretion in the development of the Plan, particularly the Educational Components.

(b) Board has consistently demonstrated its good faith throughout the past four years of litigation, Plan development and implementation (Opinion II Findings 2, 3, 567 F. Supp. at 274).

12. It is of course proper for the United States to seek to assure that Board does not abuse its discretion by including in

the Plan any educational programs that are not properly linked to desegregation (as *Arthur*, 712 F.2d at 813 put it, they are "a means of upgrading an educational system in ways only remotely related to desegregation"). In the circumstances of this case, *Arthur* and *Liddell* teach the proper standard for determining whether the cost of any given program is appropriately included in the amount "adequate for implementation of the Plan" is whether the program is a reasonable exercise of Board's discretion to adopt programs that materially aid the implementation of the Plan developed pursuant to the Consent Decree and approved by the United States and this Court. Absolute dollar precision is not required when determining the costs of a desegregation plan, particularly when (as here) the local board has been acting in good faith. *Arthur*, 712 F.2d at 814-15.

13. By its agreement in Section 15.1 to attempt to provide financial resources "adequate for implementation of the desegregation plan," the United States clearly agreed to help pay for the Plan that was required by, and has since been developed and implemented pursuant to, the Consent Decree. That agreement includes helping to pay for a plan (like the current one) that includes educational components in magnet schools (Section 4.12), in desegregated schools (Sections 10.1 and 10.4) and particularly in racially isolated schools (Section 2), including the following items outlined in Section 7:

> 7.1 Remedial and compensatory educational programs.
>
> 7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that validly measure student achievement) for academic, vocational and alternative educational studies,
>
> 7.3 Preservice and inservice instruction for administrators, principals, teachers and other school personnel.
>
> 7.4 Selection, and evaluation of the performance of, principals and supporting leadership staff.

7.5 Testing, counseling, guidance and student welfare.

7.6 Physical facilities, safety and security.

7.7 Supportive relationships between such schools and groups and institutions in the community and in government.

14. Section 15.3 states:

> The parties recognize that financial cost of implementation does not excuse the failure to develop a desegregation plan consistent with the principles set forth in §§2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in §2.1.

That provision makes plain the financial responsibilities of the parties under Section 15.1 were to apply fully to the Educational Components described in various sections of the Consent Decree. As for the last clause, that specifically allows affordability to be considered in meeting the Student Assignment objective of the Consent Decree (Section 2.1). Indeed, its use of the singular form "objective" in referring to Section 2.1 reinforces the normal reading that the same clause does not apply to the other objectives stated in Section 2, including particularly Section 2.2 relating to the Educational Components. If any further confirmation were required, Section 7 of the Consent Decree contains a specific reference to "the objective [again used in the singular] stated in Sec. 2.2" demonstrating once again the Consent Decree's draftsmen were meticulous in their distinctions and cross-references. Thus the Consent Decree's clear and unambiguous language requires no resort to extrinsic evidence on this score.

15. Section 15.3 therefore does not allow consideration of affordability as to development of a plan containing educational components consistent with the principles set forth in Section 2.2. Affordability is a legitimate consideration of

practicability only with respect to Section 2.1, which requires that the Plan seek to establish the greatest "practicable" number of stably desegregated schools. But that is really not critical. Even were it otherwise, to the extent affordability may realistically limit the type of plan that can be developed and implemented, it does not qualify the obligation of the United States any more than it qualifies Board's obligation. Both are obligated by Section 15.1 to attempt to share the costs of programs that it is determined will materially aid in implementing the Plan.

16. In response to the *Arthur-Liddell* analysis, the United States offers far more crabbed approaches:

> (a) One is a "but for" test, which would exclude programs from a desegregation remedy unless such programs are so unique to desegregation that they would never otherwise have been adopted. Such a test not only conflicts with the "materially aid" standard but would place an unfair and unrealistic burden on the Board. *Liddell III*, slip op. at 50; *Arthur*, 712 F.2d at 813. Such a "but for" principle would fail to recognize the wide-ranging list of both student assignment and educational programs and methods agreed to in Sections 4 and 7. It would ignore the reality of Board's careful desegregation planning, through which the programs constituting the Plan were formulated, and the United States' wholehearted approval of the Plan.
>
> (b) As a second line of defense the United States urges an "incremental cost" test, which would exclude programs from a desegregation remedy merely because they are desegregation programs initially adopted by Board before the Consent Decree. That would be an insupportable and artificial limitation. Such programs (Finding 304(a)) are generally voluntary transfer programs and magnet schools and programs — basic elements of the Student Assignment Plan. It would be illogical for Board to be required to discontinue these programs or not to count them as part of Board's desegregation expenditures. Had the parties wished to exclude pre-existing desegregation programs from the desegregation plan referred to in the Consent Decree, they could have easily done so. They did not.

This Court finds the United States' proposals unacceptable and adheres to the *Arthur-Liddell* standards.

Standards for Determining the Share the United States Is Obligated To Attempt To Provide of the Amount "Adequate for Implementation of the Plan"

17. Section 15.1 by its terms is addressed equally to both parties and creates a mutual obligation to attempt to find and provide the total amount of financing adequate for the Plan. It says "each party" is to address the search and provision of funds "adequate for implementation of the desegregation plan," a phrase that applies to the total amount of financing necessary — not some severable proportion of that total amount.

18. Circumstances surrounding entry of the Consent Decree further demonstrate a mutual obligation, not a divisible one, was contemplated. Its history reveals the parties had a common and overriding goal of assuring that an effective desegregation plan was developed end implemented in Chicago (see Findings 104, 108-10 and extrinsic evidence discussed in Opinion II Conclusion 4, 567 F. Supp. at 282). That joint purpose was reflected in Section 15.1, where each party agreed to do everything possible to find the necessary financing. As stated in Finding 108, the Decree "represents the only instance in which a major urban school system has agreed, without any litigation or determination of liability issues, to develop and implement a system-wide desegregation plan under court supervision". That Decree contemplated, and the Plan has manifested, the extensive use of expensive compensatory educational remedies to alleviate the effects of past discrimination. In 1980, as now, Board was faced with massive financial deficits, and the joint funding provision of the Consent Decree also reflected recognition that Board's finances were such that it could not voluntarily agree to develop, or successfully implement, an effective desegregation plan of this type unless the federal government agreed to share the financial burdens.

19. Because they are in fact contracts (with the added imprimatur of court approval), consent decrees are construed according to precepts of contract construction. Opinion III, 717 F.2d at 382 and cases cited. Board engages in extensive legal analysis to urge on this Court the applicability of contract principles, based on the law of joint and several obligations or the law of joint ventures. Those concepts are of course born of somewhat different relationships than are involved here, though the United States does not really counter Board's arguments with cogent analysis. But it is not necessary to decide the questions here as though they involved strict joint and several liability or a joint venture in the classic sense. As Finding 110 makes plain, whether Section 15.1 is looked at in its literal terms — which do not specifically limit the amount of the United States' financial commitment — or whether some notion of reasonable expectations is applied to that commitment, there can be no question the United States' undertaking is broad enough to embrace the amount represented by Board's current request (as modified by this opinion).

20. Some light is also cast by the equitable principles that guide the fashioning and effectuating of desegregation decrees. *Milliken v. Bradley,* 433 U.S. 267 (1977). In that respect, allocating the costs of a desegregation plan is part of the remedial power of a district court, *United States* v. *Board of School Commissioners of Indianapolis,* 677 F.2d 1185, 1186 (7th Cir.), *cert. denied,* 103 S.Ct. 568 (1982) ("*Indianapolis School Board*"). Courts have frequently allocated such costs equally between two responsible parties. *Bradley v. Milliken,* 402 F. Supp. 1096 (E.D. Mich. 1975), *aff'd,* 540 F.2d 229 (6th Cir. 1976), *aff'd,* 433 U.S. 267 (1977) ("*Milliken II*"); *Indianapolis School Board,* 677 F.2d at 1188. And courts have frequently considered the ability of the parties to provide financing for the plans. *Milliken II,* 540 F.2d at 246; *Liddell v. Board of Education of the City of St. Louis,* 491 F. Supp. 351, 357 (E.D. Mo. 1980), *aff'd and remanded*, 667 F.2d 643 (8th Cir.), *cert. denied,* 454 U.S. 1081, 1091 (1981).

21. Though the parallel is of course not complete, those equitable approaches tend to fortify the determination reached in Conclusion 19:

(a) In those cases as in this one, the parties share responsibility for financing the Plan, although the present case rests on a contractual obligation rather than (as in those cases) one arising in tort law.

(b) Similar equitable factors, such as ability to pay, are present in this case as in those.

(c) This Court's equitable remedial powers are invoked by the need to remedy the United States' persistent violations of its financial obligations.

Consideration of Funding Contentions of the United States

22. Extrinsic evidence as to the events that led to the inclusion of Section 15.1 in the Consent Decree (Findings 103-10) demonstrates the United States' obligation was not limited or qualified by the prior existence or funding levels of ESAA. Instead Section 15.1 established a general obligation on the part of *both* parties, to be "interpreted and applied as appropriate in whatever future circumstances might arise" (Finding 110).

23. This is the first occasion on which the parties and this Court have addressed the amount "adequate for implementation of the Desegregation Plan" (Section 15.1). As already stated, that determination is whether the programs under consideration materially aid the success of the Plan. There is no estoppel against Board arising from any earlier statements predicated on the limited funds then currently available to it.

24. Board is not required to exhaust all its available resources for implementation of the Plan before the United States becomes obligated to find and provide resources for the Plan (Opinion II Conclusion 7, 567 F. Supp. at 283). Although Board has substantial general revenues (from local taxes and from general state aid, including State Title I aid), and those funds are not precluded by State law from being used for

desegregation expenses, Board is not obligated to destroy the basic educational function of the school system by diverting funds needed and used for such purposes. Nor is Board required, as the United States suggests, always to divert any further increment of such general revenues from other educational programs to pay Plan costs. Such a standard — forcing the robbing of Peter to pay Paul — would render the United States' financial obligations meaningless.

25. United States argues if a program is "necessary" for the Plan, then Board has an obligation to shift funds from its general resources to pay for the program, and if Board does not do so, then by definition the program has been shown not to be "necessary." In either event, the asserted result is that the United States does not have to pay for the item. Like others of the United States' contentions, that one is legally bankrupt. Of course, a program may materially aid success of the Plan, or be necessary for the Plan, even though Board has not had funds available to be diverted from its basic educational system to pay for the program.

26. Board is not "master of its own fate" and depends on substantial general state and federal revenues to meet *all* its obligations. Requiring Board to consider all general state and federal revenues received by it as "available" for funding the Plan must be rejected, for it would require Board to superimpose a financed Plan on a devastated school system. *See, Milliken II,* 540 F.2d at 245-51. Any successful desegregation program, especially one containing educational components, presupposes a functioning basic educational system. Courts that have apportioned costs between local and state defendants have taken care to ensure there is no diminution in the quality of education or in the allocation of existing state revenues even state revenues that are for compensatory education. *Berry v. School District of the City of Benton Harbor,* 515 F. Supp. 344, 386-88 (W.D. Mich. 1981), *aff'd and remanded,* 698 F.2d 813 (6th Cir.), *cert. denied,* 104 S.Ct. 235, 236 (1983).

27. General funds received from either the State of Illinois or the federal government must be considered part of Board's general revenues. Any expenditure of such funds for implementation of the Plan must be considered part of Board's contribution to financing the Plan. *See Liddell v. Board of Education of the City of St. Louis*, 677 F.2d 626, 631 (8th Cir.), *cert. denied* 103 S.Ct. 172 (1982).

28. Board received federal assistance before the Consent Decree, and continues to receive such assistance today, under various federal funding programs unrelated to desegregation. Together those encompass the categorical federal educational assistance that is available to all school districts in the United States, including Board, for essential educational programs, not for funding the incremental costs of desegregation plans. Those funds have been and continue to be received by Board on the basis of criteria that are unrelated to and do not take into account either the Consent Decree or the costs of implementing the Plan.

29. Increases in general federal funding since September 1980, received by Board for purposes other than desegregation, neither eliminate nor derogate from the United States' obligation under Section 15.1. Neither party contemplated at the time of the Decree that federal ECIA Chapter I funds would be used to fulfill the Section 15.1 obligations of the United States (Finding 357). [1] Moreover, Board certainly did not agree to develop and implement a costly plan in exchange for the same level of federal funding it would have received even had it not entered into the Consent Decree or implemented a desegregation plan. Finally, the Court of Appeals has already implicitly rejected such a contention (Conclusion 5(a)).

30. Other United States contentions that its obligations under Section 15.1 are somehow satisfied or eliminated by other federal funding are equally untenable. It is unnecessary (as Board has done in its proposed Conclusions of Law) to dwell on the subject at length, for Findings 350-68, Addendum

A to Findings 301-76 and the application of ordinary common sense demonstrate conclusively the poverty of the United States' position.

31. Section 15.1 imposes the same "good faith" standard to both Board and the United States. Board has been complying with that standard while the United States has not. That total disparity of performance reflects the height of irony in light of the fact Board and the United States have such differing abilities to find and provide funds and such differing competing obligations.

32. In Section 15.1 the United States made a firm commitment — it signed a contract — to make "every good faith effort to find and provide every available form of financial resources adequate for implementation of the Plan." No "intended grantee" has a comparable claim to action on the part of the United States. No number or form of Executive Branch "policy" decisions, "representations" or subsequent "commitments" can undo, override or diminish this contractual promise to Board — a promise that has the extra force of embodiment in a consent decree.

33. In a sense the United States' various agreements as to funding, dealt with in the foregoing conclusions, are variants on its most fundamental one: Its Section 15.1 promise is meaningless and unenforceable, because it can define "every available form of financial resources" as wholly empty by deliberately making *all* financial resources *un* available. No court is required to accept that distortion of contract law from any contracting party, whether sovereign or private litigant.

34. Had the United States not so ignored and subverted its obligation under the Consent Decree, it would have retained substantially greater discretion within the bounds of its commitment than it now portrays itself as possessing. Section 15.1 contemplated both (a) that the United States would have discretion as to "how" it would meet its obligation and (b) that

it was not required to go beyond "every good faith effort," even if the full result desired was not obtained through such efforts. *See, Western Geophysical Co. v. Bolt Associates, Inc.*, 584 F.2d 1164, 1171 (2d Cir. 1978).

35. Though the United States complains it is not being treated equally, it is in fact only now beginning to be treated equally. To the extent the United States' present obligations may appear to be different than Board's, it is not because the standard being applied to the United States is any different from that applicable to Board. Rather it is because (a) the United States has so egregiously violated that standard and (b) the very nature and identity of the parties makes their respective abilities "to find and provide every available form of financial resources" so very different.

Propriety of the Programs Proposed by Board for Implementation of the Plan, and Summary as to the Amount of United States' Obligation

36. Most of the programs for which Board now seeks funding are designed to implement the Educational Components portion of the Plan. In circumstances like those present in Chicago (*see* Findings 145-61), educational components are a critical part of a constitutional desegregation plan. *Milliken II; Liddell III.* Detrimental effects of years of segregation are not cured merely by busing students to create integrated schools, *Milliken II,* 433 U.S. at 283. Instead a desegregation plan must include the additional programs necessary to provide equal educational opportunity to all students. *See, Kelley v. Metropolitan County Board,* 492 F. Supp. 167, 188 (M.D. Tenn. 1980); *Tasby v. Estes,* 412 F. Supp. 1192, 1195, 1210-11 (N.D. Tex. 1976), *rev'd and remanded on other grounds,* 572 F.2d 1010 (5th Cir. 1978).

37. Courts have repeatedly considered and approved the same types of educational components contemplated by the Consent Decree, and the same types of implementation programs for which Board now seeks funding:

(a) Effective Schools Project. *See, Liddell III,* slip op at 47; *Berry,* 515 F. Supp. at 369; *Kelley v. Metropolitan County Board,* 511 F. Supp. 1363, 1368-70 (M.D. Tenn. 1981), *aff'd in part, rev'd in part on other grounds,* 687 F.2d 814 (6th Cir. 1982), *cert. denied,* 103 S. Ct. 834 (1983); *Indianapolis School Board,* 506 F. Supp. at 673; *Tasby,* 412 F. Supp. at 1217; *Milliken II,* 402 F. Supp. at 1143-44; *United States v. Texas,* 342 F. Supp. 24, 30, 33-34 (E.D. Tex, 1971), *aff'd,* 466 F.2d 518 (5th Cir. 1972).

(b) Trainers Institute/Staff Development, *See, Evans v. Buchanan,* 582 F.2d 750, 770-71 (3d Cir. 1978) (en banc), *cert. denied,* 446 U.S. 923 (1980); *Kelley,* 511 F. Supp. at 1371; *Indianapolis School Board,* 506 F. Supp. at 672; *Tasby,* 412 F. Supp. at 1207, 1220; *Milliken II,* 402 F. Supp. at 1139; *United States v. Texas,* 342 F. Supp. at 34-35.

(c) Management Information System/Equity Compliance. *See, Liddell III,* slip. op. at 54; *Milliken II,* 402 F. Supp. at 1119, 1145; *Berry,* 515 F. Supp. at 382-84; *Indianapolis School Board,* 506 F. Supp. at 673; *Tasby,* 412 F. Supp. at 1206, 1220-21; *Morgan v. Kerrigan,* 401 F. Supp. 216, 248-49, 268-69 (D. Mass. 1975), *aff'd,* 530 F.2d 401 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976).

(d) Affirmative Action. *See, Berry,* 515 F. Supp. at 376; *Tasby,* 412 F. Supp. at 1219-20; *United States v. Texas,* 342 F. Supp. at 30; *Redman v. Terrebonne Parish School Board,* 293 F. Supp. 376, 380 (E.D. La. 1967); *Hill v. Lafourche Parish School Board,* 291 F. Supp. 819, 823 (E.D. La. 1967).

(e) Within—School Segregation, *See, United States v. Texas,* 342 F. Supp. at 34. (See also Consent Decree, Part III)

(f) Magnet Schools. *See, Liddell III,* slip op. at 39; *Berry,* 515 F. Supp. at 365-66; *Kelley,* 511 F. Supp. at 1370; *Reed v. Rhodes,* 455 F. Supp. 569, 599-600 (N.D. Ohio 1978); *Milliken II,* 402 F. Supp. at 1146-47; *Morgan,* 401 F. Supp. at 235, 246-47.

(g) Special Education/Testing. *See, Tasby,* 412 F. Supp, at 1217; *Morgan,* 401 F. Supp. at 252; *United States v. Texas,* 342 F. Supp. at 36.

(h) Vocational/Technical Education. See, *Milliken II,* 402 F. Supp, at 1118, 1140-41; *Reed,* 455 F. Supp. at 599.

(i) Curriculum and Instruction. *See, Evans,* 582 F.2d at 771; *Berry,* 515 F. Supp. at 373-74; *Indianapolis School Board,* 506 F. Supp. at 672; *Morgan,* 401 F. Supp. at 234; *Milliken II,* 402 F. Supp. at 1118, 1143-44; *United States v. Texas,* 342 F. Supp. at 30-34.

(j) Student Discipline. *See, Evans,* 582 F.2d at 771-72; *Milliken II,* 540 F.2d at 250; *Berry,* 515 F. Supp. at 379-81; *Indianapolis School Board,* 506 F. Supp. at 672; *Reed,* 455 F. Supp. at 601-02; *Tasby,* 412 F. Supp. at 1219.

(k) Bilingual Education. *See, Milliken II,* 402 F. Supp at 1144; *Tasby,* 412 F. Supp. at 1217; *Morgan,* 401 F. Supp. at 252; *United States v. Texas,* 342 F. Supp. at 30-34.

(l) Evaluation. *See, Liddell III,* slip op. at 54; *United States v. Texas,* 342 F. Supp. at 38.

38. In light of Findings 201-72 and the authorities cited in Conclusions 36 and 37, each of the programs Board proposes for implementing the Plan (except as stated in Findings 243, 250 and 253) properly provides the desegregation remedy required by the Consent Decree, "materially aids the success of the overall desegregation effort," and indeed is necessary for full implementation of the Plan. Accordingly the cost of each such program is properly included in the total amount "adequate for implementation of the desegregation plan" within the meaning of Section 15.1. As reflected by Finding 265, the total amount adequate for implementation of the Plan for school year 1984-85 is thus $171.631 million, and the share of that amount the United States is obligated to make every good faith effort to find and provide pursuant to Section 15.1 is $103.858 million.

Verification of the Current Availability of Funds

Opinion III, 717 F.2d at 383 n.8 directed this Court to verify the availability of certain funds, appropriated to the Department of Education, to be provided to Board for implementation of the Plan. This Court has now had the opportunity (see Opinion II, Conclusion ll, 567 F. Supp. at 284) to examine extensively the availability of both 1983 and 1984 appropriations (for which the relevant statutes and regulations are nearly identical) and to reconsider the contentions of the United States with respect to the availability of those funds, This Court hereby verifies the availability of funds in the following conclusions.[41]

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[41] It was clearly the United States' obligation to do all the spadework for this purpose, consistent with its duty "to find and provide" under Section 15.1. Here too the United States has breached its commitment, so it has been Board that has from the outset scrutinized the relevant appropriations bills, statutes and regulations to identify available funds for the United States and that has now identified further available funds as set forth below.

39. Funds are "available" to the United States within the meaning of the Consent Decree where Congress has appropriated them to the Executive Branch for purposes consistent with financing Board's desegregation activities. To the extent Congress has given the Department of Education discretion to provide particular funds to Board, the Consent Decree requires that the Executive Branch consider these funds "available." Furthermore, to the extent consistent with its statutory authority, the Executive Branch is required to interpret and conform its existing program regulations to meet its financial obligation to the Board under Section 15.1. *Citizens for a Better Government v. Gorsuch,* 718 F.2d 1117 (D.C. Cir. 1983); *Gautreaux v. Pierce,* 690 F.2d 616 (7th Cir. 1982); *Ferrell v. Pierce,* 560 F. Supp. 1344 (N.D. Ill. 1983).

40. As the following Conclusions reflect, fiscal year 1983 funds and fiscal year 1984 funds were and currently are available to the United States, within the meaning of Section 15.1, to assist Board in financing the Plan. This is wholly apart from, and in spite of, the efforts of the United States to render funds *un*available—a matter dealt with in later Conclusions.

41. In fiscal years 1983 and 1984 Secretary was authorized to distribute direct grants through Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-4; Pub. L. 97-35, Title V, § 509, 95 Stat. 443 (1981). As stated in Finding 402, Secretary administratively allocated $24 million to the Title IV program in each of those years.

42. In fiscal years 1983 and 1984 Secretary was authorized to grant all or any part of those Title IV monies directly to local educational agencies to finance the desegregation activities specified in 42 U.S.C. § 2000c-4. In those years Board was implementing a court approved desegregation plan and qualified as a local educational agency eligible to receive direct Title IV race and national origin desegregation assistance. 42 U.S.C. § 2000c-4; 34 C.F.R. §§ 270.04, 270.06.

43. Secretary is authorized by the Title IV enabling statute, and permitted under his Title IV regulations (34 C.F.R. §270.72), to provide Title IV assistance for:

(a) training and advisory programs designed to provide, develop or disseminate the information and skills necessary effectively to implement a desegregation plan (including particularly the educational components of Board's Plan);

(b) any training, staff development or advisory programs that are related to and materially assist in implementing a desegregation plan; and

(c) inservice training and advisory programs in connection with special educational programs designed to raise minority pupils' academic achievement, where the educational programs are required remedial components in a court approved desegregation plan and are supplemental to preexisting compensatory educational or basic skills development services provided by a school district.

44. Inservice training and staff development components of the following programs designed to implement the Plan's Educational Components meet all applicable Title IV statutory and regulatory criteria and are activities eligible for direct Title IV race or national origin desegregation assistance:

(a) Effective Schools Program

(b) Racially Identifiable Schools Program

(c) Trainers Institute

(d) OEEO Systemwide Staff Development Program for Racially Identifiable Schools

(e) OEEO Systemwide Staff Development Program for Desegregated Schools

(f) Magnet Schools Expansion Program

(g) Magnet Schools Staff Development Program

(h) Special Education/Testing Program

(i) Vocational and Technical Education Program

(j) Curriculum and Instruction Program

(k) Student Discipline Program

(l) Bilingual Education Program

(m) Evaluation Program

45. Consultant and advisory components of the following programs designed to implement the Plan's Educational Components also meet all applicable statutory and regulatory criteria and are activities eligible for direct Title IV race or national origin desegregation assistance:

(a) Effective Schools Program

(b) Racially Identifiable Schools Program

(c) Affirmative Action Program

(d) Equity Compliance Program

(e) Within School Degregation Program

(f) Magnet School Expansion Program

(g) Special Education/Testing Program

(h) Vocational and Technical Education Programs

(i) Curriculum and Instruction Program

(j) Student Discipline Program

(k) Bilingual Education Program

(l) Evaluation Program

46. Secretary's statutory authority to consider "such other factors as he finds relevant" in making Title IV grant awards permits him to formulate additional selection criteria and, pursuant to such criteria, to establish classifications or priorities for allocating available Title IV funds among otherwise eligible applicants, and to reserve or set aside Title IV funds for particular eligible applicants. Title IV's statutory provision that Secretary "consider" other applications for funds does not subsume his authority referred to in the preceding sentence to establish priorities and to reserve or set aside funds for particular applicants.

47. Secretary has deliberately flouted the United States' contractual obligations (one owed to no other eligible applicant for Title IV funds) "to find and provide every available form of financial resources" for implementation of the Plan. To honor that obligation as he should have, Secretary was and is required to interpret, apply and, if necessary, modify his existing Title IV and Educational Department General Administrative Regulations ("EDGAR") to enable him to comply fully with the United States' financial commitment to Board under Section 15.1.

48. Secretary's EDGAR provisions apply to the Title IV program to the extent not expressly prohibited by Title IV's implementing regulations. Those implementing regulations, which permit Secretary to make Title IV grants at any time and on an application-by-application basis, do not require that he award funds only after a "competition" among all eligible applicants for those funds. 34 C.F.R. §270.74(a).

49. EDGAR provisions requiring a competition among all applications for a program's available funds, including awards based in part upon a rank ordering of all submitted applications, do not apply to grant awards through Title IV, which may be made by Secretary at any time. 34 C.F.R. §§270.02(c) and (e), 270.74(a). Secretary's authority to create preferences and priorities permits him to reserve Title IV funds for one applicant and to award them without regard to any competitive selection procedures otherwise specified in his Title IV or other regulations.

50. Secretary's existing Title IV implementing regulations, which permit him to consider as award criteria (a) the availability of financial resources to a school district and (b) the nature and gravity of a school district's desegregation problems, allow him to consider the Consent Decree in allocating Title IV funds among otherwise eligible applicants.

51. United States' legal obligation under Section 15.1, and the policy determinations the Consent Decree embodies, con-

stitute "relevant factors" within the meaning of 42 U.S.C. §2000c-4(b), the EDGAR provisions and the Title IV implementing regulations. Thus Secretary is authorized to reserve Title IV funds for Board, or otherwise to provide Title IV funds to Board, in preference to other eligible applicants for these funds.

52. All fiscal year 1984 funds allocated to the Title IV program are currently unobligated. No potential applicant, other than Board, has any legal entitlement to those Title IV funds. To the extent (if any) such potential applicants could have asserted due process rights to "compete" under Secretary's regulations for available Title IV funds, Secretary could have obviated any such problem in fiscal years 1983 and 1984 by publishing a notice in the Federal Register of Secretary's prospective intention to reserve certain Title IV funds for Board pursuant to the United States' Consent Decree obligation. 20 U.S.C. §1232(b)(2)(A) and (B), 5 U.S.C. §553(d)(1) and (3). In any event, potential applicants for fiscal year 1984 Title IV funds have no due process right to "compete" for these funds in light of Secretary's announcement to all applicants in the Federal Register that any availability of those funds for a 1984 grant competition is contingent upon the outcome of the present litigation. 48 Fed. Reg. 56254, 86255 (Dec. 20, 1983).

53. In fiscal year 1983 Secretary was not legally obligated to provide continuation awards to particular grantees, other than Board, from the Title IV program. It was within Secretary's authority to decline to finance continuation projects on the ground that, as a result of his financial commitment to Board, there were no program funds "available" for continuation awards or that it was in the United States' "best interest" to provide those funds to Board rather than to continuation projects. 34 C.F.R. §75.253 (a). Secretary is not legally required to provide continuation awards of Title IV funds in fiscal year 1984.

54. Congress did not in fiscal year 1984 direct that Title IV funds could not be made available to provide grants to local educational agencies. Certain committee report language describes Secretary's administrative practice of providing Title IV grants to state educational agencies and desegregation assistance centers. That language does not expressly prohibit Secretary from providing Title IV grants directly to local educational agencies under the program authorized at 42 U.S.C. §2000c-4. It is insufficient to repeal Secretary's statutory authority to provide such grants to local educational agencies or to operate as congressional ratification of Secretary's prior funding practices. *TVA v. Hill*, 437 U.S. 153, 189-93 (1978); *SEC v. Sloan*, 436 U.S. 103, 117-19 (1978); *Demby v. Schweicker*, 671 F.2d 507, 512-13 (D.C. Cir. 1981). *See also* Conclusion 63.

55. In sum as to Title IV funds, there were in fiscal year 1983 and are in fiscal year 1984 no statutory, regulatory or other legal constraints that would preclude Secretary from providing all or part of the $24 million allocated to the Title IV subaccount to Board for implementing the programs identified as eligible for direct Title IV assistance in Conclusions 44 and 45. All remaining fiscal year 1983 Title IV funds and all fiscal year 1984 Title IV funds have been and currently are "available" to the United States within the meaning of Section 15.1.

56. In each of fiscal years 1983 and 1984 Congress appropriated $28,765,000 for the Secretary's Discretionary Fund, 20 U.S.C. §3851. Secretary is required to use $10,725,000 of that amount annually to fund the statutorily mandated programs specified in 20 U.S.C. §3851(b). Secretary was authorized in each year to spend the remaining $18,040,000 reserved for the Secretary's Discretionary Fund for any of the purposes or programs specified in 20 U.S.C. §3851(a), including research and demonstration projects related to the purposes of ECIA. Those purposes include assisting local educational agencies in implementing desegregation

plans, in meeting the needs of children in schools undergoing desegregation and in addressing educational problems caused by racial isolation in schools. 20 U.S.C. §3851(a)(2); 20 U.S.C. §3832(3) and (7).

57. All programs and program elements making up Board's educational components are related to the purposes of ECIA, 20 U.S.C. §3832(3) and (7). Many of those programs could have been found by Secretary to qualify for discretionary funds under the plain meaning of 20 U.S.C. §3851(a)(2) as demonstrating desegregation techniques or educational remedies of national or general significance.

58. Secretary is also authorized through the Discretionary Fund to provide grants to local educational agencies to assist them in implementing programs under ECIA Chapter 2, including programs to assist local educational agencies in implementing desegregation plans, in meeting the needs of children in schools undergoing desegregation and in addressing educational problems caused by racial isolation. 20 U.S.C, §3851(a)(4); 20 U.S.C. §3832(3) and (7). By its plain and unambiguous language, 20 U.S.C. §3851(a)(4) authorizes Secretary to provide direct grants of discretionary funds to local educational agencies to supplement activities or programs also eligible for financial assistance through the ECIA Chapter 2 state block grants, including 20 U.S.C. §3832(3) and (7). Nothing submitted by the United States has shown a clearly expressed legislative intent contrary to the plain statutory language. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982); *Pullman Standard v. ICC*, 705 F.2d 875, 879 (7th Cir. 1983).

59. All programs and program elements making up Board's educational components are authorized for funding under ECIA Chapter 2, 20 U.S.C, §3832(3) and (7), and are eligible for financing through a direct grant of discretionary funds to Board under 20 U.S.C. §3851(a)(4).

60. Secretary's proposed Discretionary Fund regulations, 49 Fed. Reg. 7546 (February 29, 1984), state (a) discretionary funds may not be used to meet "local needs" and (b) under 20 U.S.C. §3851(a)(4) Secretary may only provide technical assistance to local educational agencies. Those are solely administrative constraints and do not implement statutorily imposed limitations on Secretary's use of discretionary funds. Given his statutory authority to provide discretionary funds to Board under 20 U.S.C. §3851(a)(2) and (4), Secretary is required to modify his regulations to enable him to comply fully with the United States' financial commitment to Board under Section 15.1. *Gautreaux; Gorsuch; Ferrell.*

61. Secretary is authorized by statute to allocate discretionary funds among potential applicants for those funds. It is within Secretary's regulatory authority to establish program priorities for the uses of those funds, to establish absolute preferences that reserve all or part of the funds for a particular priority, and to establish competitive preferences for applications that meet a particular priority. 34 C.F.R. §§75.105(b)(1), (c)(2), (c)(3). Secretary may under those regulations establish priorities and competitive and absolute preferences for a broad range of purposes, including recognition of the United States' financial commitment to Board under the Consent Decree. Secretary is authorized to establish a priority and a competitive or absolute preference in Board's favor, and thus specifically reserve all or part of non-statutorily mandated Discretionary Fund monies for the Plan. *See, e.g.*, 48 Fed. Reg. 50919 (November 4, 1983).

62. Secretary's EDGAR provisions relating to the selection of projects for funding after a rank ordering of all submitted applications are usually used by Secretary to make grants from the Discretionary fund. However, Secretary makes the final selection of applications for funding, and he is permitted by his regulations to change the rank order in which applications would otherwise be selected for funding based upon any

information in the application, any other information he deems relevant to the program criteria, and any priorities he has established that set aside or reserve discretionary funds. 34 C.F.R. §75.217(d)-(e). Secretary's authority to create preferences and priorities subsumes the EDGAR "competitive" selection procedures. It permits him to reserve discretionary monies for one applicant and to award them to that applicant without regard to the EDGAR competitive selection criteria. 34 C.F.R. §75.105(c)(3).

63. In its fiscal year 1983 and 1984 appropriation acts Congress did not earmark or allocate particular sums for the nonmandated programs within Secretary's Discretionary Fund. Secretary is not legally bound by program allocations or budgetary estimates not incorporated into the language of an appropriation act itself. *Matter of LTV Aerospace Corp.*, 55 Comp. Gen. 308, 319 (1975); *Matter of Financial Assistance to Intervenors*, 59 Comp. Gen. 228, 231 (1980); *see also, Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 547 n.6 (Ct. Cl. 1980); United States General Accounting Office, *Principles of Federal Appropriations Law* 5-94 to 5-103 (1982). Notwithstanding language in congressional committee reports recommending or directing certain uses for Secretary's Discretionary Funds, Secretary did in fiscal year 1983, and does in fiscal year 1984, have the authority to make such discretionary funds available to Board to finance its desegregation activities.

64. All fiscal year 1984 funds reserved for the programs or purposes specified in 20 U.S.C. §3851(a) are currently obligated. No potential applicant, other than Board, has any legal entitlement to those Discretionary Fund monies. To the extent (if any) such potential applicants could have asserted due process rights to "compete" under Secretary's established priorities for the use of his discretionary funds, Secretary could have obviated any such problem in fiscal years 1983 and 1984 by publishing a notice in the Federal Register of his prospective

intention to estsblish a priority or preference reserving certain discretionary funds for Board pursuant to the United States' Consent Decree obligation. 20 U.S.C. §1232(b)(2)(A) and (B); 5 U.S.C. §553(d)(1) and (3). In any event, potential applicants for fiscal year 1984 discretionary fund monies have no due process right to "compete" for those funds in light of Secretary's announcements in the Federal Register that any availability of those funds for 1984 grant competitions is contingent upon the outcome of the present litigation. 49 Fed. Reg. 7551 (February 29, 1984); 49 Fed. Reg. 2462 (January 19, 1984); 48 Fed. Reg. 50919 (November 4, 1983).

65. In fiscal years 1983 and 1984 Secretary was not legally obligated to provide monies from his discretionary fund for continuation awards to particular applicants other than Board. It was within Secretary's authority to decline to finance continutation projects on the ground that, as a result of his financial commitment to Board, there were no program funds "available" for continuation awards or that it was in the United States' "best interest" to provide those funds to Board rather than to continuation projects. 34 C.F.R. §75.253(a).

66. In sum as to Discretionary Funds, there were in fiscal year 1983 and are in fiscal year 1984 no statutory, regulatory, or other legal constraints that would prevent Secretary from providing all or part of the nonstatutorily directed $18,040,000 appropriated to the Discretionary Fund to Board for financing the programs included in Board's educational components. All fiscal year 1984 funds have been and currently are "available" to the United States within the meaning of Section 15.1.

67. Secretary is authorized by the Joint Funding Simplification Act to modify his regulations where they impede financing a particular project for which assistance is available from more than one grant program. 31 U.S.C. §§7103(b)(3)-(4), 7103(c). Board has demonstrated it is eligible to receive desegregation assistance monies through the Title IV program and Secretary's Discretionary Fund. To the extent Secretary's

regulations require "competition" for available Title IV or Discretionary Fund monies, if at all, Secretary is authorized to suspend those regulations to permit his providing assistance for Board's desegregation activities. Secretary's regulations promulgated pursuant to the Joint Funding Simplification Act also permit him to place in abeyance any applicable competitive selection criteria where the project for which joint financing is sought is of the minimum quality to qualify for funds. (34 C.F.R. §75.219(b)); 34 C.F.R. §75.221(c)(3) and (5). Conclusions 44, 45 and 59 establish that Board's programs meet that minimum standard. Consistent with those joint funding regulations and notwithstanding any Title IV or Discretionary Fund regulations for selecting among applications for funds, Secretary is authorized to provide funds from both sources directly to Board to meet the United States' financial commitment under Section 15.1.

68. In fiscal years 1983 and 1984 Congress appropriated a lump sum amount to finance Title IV and five other programs within the Special Programs and Populations account, and did not designate or earmark particular sums for each program. H.J. Res. 631, Title III; P-L 98-139, Title III, 98 Stat. 888. In both fiscal years Secretary administratively allocated $24 million to the Title IV program, leaving $28,058,000 in fiscal year 1983 funds and $23,447,000 in fiscal year 1984 funds available within the other Special Programs subaccounts. *Id.*

69. Where several programs are financed through a lump sump appropriation, an executive agency is authorized to "reprogram" or allocate the appropriations among the various programs as it deems appropriate, notwithstanding program allocations or budgetary estimates that appear in congressional reports accompanying the appropriations act. *LTV Aerospace Corp.*, 55 Comp. Gen. at 319; *Matter of Newport News Shipbuilding and Dry Dock Co.*, 55 Comp. Gen. 812, 819-20 (1976); *Blackhawk Heating & Plumbing Co.*, 622 F.2d at 547 n.6; United States General Accounting Office, *Principles of Federal Appropriations Law* 5-94 to 5-103 (1982).

70. Secretary was authorized in fiscal year 1983 and is authorized in fiscal year 1984 to reprogram available funds from the other Special Programs subaccounts into the Title IV subaccount, to the extent the total amount distributed through the Title IV subaccount did not or does not exceed $37,100,000. P.L. 97-35, Title V §509, 95 Stat. 443. Those reprogrammed Special Programs funds could thus be made available to Board to finance any of the Title IV authorized programs or program elements described in Conclusions 44 and 45.

71. Secretary is also authorized in fiscal year 1984 to reprogram the fiscal year 1983 Special Programs carryover funds into the Title IV subaccount. Those carryover funds are currently unobligated. They may be used by Secretary for any purposes for which they were originally appropriated, and may be reprogrammed. 20 U.S.C. §1225. Those carryover funds were originally appropriated in fiscal year 1883 and are not subject to the $37,100,000 limitation on Title IV expenditures in fiscal year 1984.

72. Funds capable of being reprogrammed are available to meet the United States' Consent Decree obligations notwithstanding congressional disapproval of a reprogramming request. *Blackhawk Heating; see Immigration and Naturalization Service v. Chadha,* 103 S.Ct. 2764 (1983).

73. All fiscal year 1984 funds allocated to those other Special Programs subaccounts are currently unobligated. No potential applicant, other than Board, has any independent legal entitlement to those other Special Programs funds. To the extent (if any) such potential applicants could have asserted due process rights to "compete" under Secretary's regulations for available Special Programs funds, Secretary could have obviated any such problem in fiscal years 1983 and 1984 by publishing a notice in the Federal Register of Secretary's prospective intention to reprogram certain special Programs funds for Board pursuant to the United States' Consent Decree obligation. 20 U.S.C. §1232(b)(2) (A) and (B); 5 U.S.C.

§553(d)(1) and (3). In any event, potential applicants for fiscal year 1984 Special Programs funds have no due process right to "compete" for those funds in light of Secretary's announcements in the Federal Register that any availability of those funds for 1984 grant competitions is contingent upon the outcome of the present litigation. See, 48 Fed. Reg. 55900 (Dec. 16, 1983); 48 Fed. Reg. 53150 (Nov. 25, 1983).

74. In fiscal years 1983 and 1984 Secretary was not legally obligated to provide continuation awards to particular grantees, other than Board, from the Special Programs subaccounts. It was within Secretary's authority to decline to finance all continuation projects on the ground that, as a result of his financial commitment to Board, there were no program funds "available" for continuation awards or that it was in the United States' "best interest" to provide those funds to Board rather than to continuation projects. 34 C.F.R. §75.253(a).

75. In sum as to Special Programs funds and carryover funds, there were in fiscal year 1983 and are in fiscal year 1984 no statutory, regulatory, or other legal constraints preventing Secretary from reprogramming such funds into the Title IV subaccount. Those funds have been and currently are "available" to the United States within the meaning of Section 15.1.

76. To the extent fiscal year 1984 funds exist in the following accounts and subaccounts, have not been committed for other purposes and are not reasonably necessary for other Department of Education functions[42], they too are "available" to Secretary within the meaning of Section 15.1:

(a) Secretary is authorized to use funds appropriated to his Salaries and Expense subaccount for contracts,

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[42] This Court recognizes that (a) most of those funds are appropriated by Congress primarily for various operational or similar costs necessary for the functioning of the Department of Education

(footnote continued on following page)

grants, or payments as he deems appropriate or necessary to carry out the functions of Secretary or of the Department of Education. 20 U.S.C. §3475. Secretary has the authority to find that payments or grants to Board, deriving from a Title VI action instituted by Secretary, are appropriate to carry out an agency function. There are no statutory or regulatory constraints preventing Secretary from making those funds available to Board.

(b) Secretary is authorized to use funds appropriated to his Office for Civil Rights subaccount for payments necessary to carry out the compliance and enforcement actions of the office.[43] P-L 98-139, Title III, 97 Stat. 894; 20 U.S.C. § 3413(c)(3). Secretary has the authority to find the United States' financial commitment constitutes an expense necessary completely to achieve the purpose of the Title VI compliance action brought against Board by the Office for Civil Rights, which culminated in the Consent Decree. There are no statutory or regulatory constraints pre-

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(footnote continued from previous page)

and (b) just as funds necessary for Board's basic operations and obligations are not available for the Plan (see Conclusion 26), those funds are not "available" to the extent reasonably necessary for the Department's operations. Thus this Conclusion's determination such funds are "available" is qualified by the condition that the Department may show that some (or perhaps even all) those funds are not available because they are necessary for Department operations. In any event, the identification of such funds by Board is a particularly apt illustration of Board's having performed a function the United States is obligated to perform under Section 15.1 and the prior orders of this Court: identifying every available form of financial resources.

[43] Department of Education's Office for Civil Rights contracts with other organizations to provide technical assistance to local educational agencies to assist them in complying fully with Title VI requirements. S.Rep. No. 247, 98th Cong. 1st Sess. 163-64 (1983) That technical assistance program was created by the Office for Civil Rights pursuant to its authority to make any payments necessary to carry out its compliance and enforcement functions. 20 U.S.C. § 3413(c)(3), P.L. 98-139, Title III, 97 Stat. 895.

venting Secretary from making those funds in his Office for Civil Rights available to Board.

(c) Secretary is authorized to use the property or funds in his Gift and Bequest account for aiding and facilitating the work of the Department. 20 U.S.C. §3481. Secretary has the authority to find that meeting the United States' Consent Decree obligations furthers the work of the Department. There are no statutory or regulatory constraints preventing Secretary from making funds or property in his Gift and Bequest account available to Board.

77. Of the fiscal year 1983 funds appropriated to or available in all non-desegregation Department of Education accounts, $21,188,206 was unobligated and, absent this Court's September 27, 1983 order, would have lapsed into the Treasury. Through a congressional reappropriation those funds could be made available to Board in fiscal year 1984 to meet the United States' Consent Decree obligation. 31 U.S.C. §1301.

78. There are no statutory, regulatory or other legal constraints preventing the Executive Branch from including, in the President's budget requests to Congress, budgetary line items requesting that Congress provide funds for particular purposes, activities or programs that Secretary has not previously undertaken. If Congress appropriated funds for such a line item, Secretary would be authorized to spend funds for that purpose. 31 U.S.C. §1301; United States General Accounting Office, *Principles of Federal Appropriations Law* at 2-11, 2-12, 2-26, 2-27 (1983). Secretary could include in his fiscal year 1985 budget proposal, and could have included in prior budget proposals, such a line item requesting that Congress appropriate funds for Board's desegregation activities.

79. There are no statutory, regulatory or other legal constraints preventing the Executive Branch from including in the President's budget request to Congress budgetary line items within grant programs or other types of accounts. Secretary is

authorized to create such line items to indicate the basis for the appropration amount requested and the manner in which he intends to allocate funds appropriated to the grant program or account. If Congress appropriated funds for such a line item, Secretary would be authorized to reserve program funds solely for the purpose of that line item. 31 U.S.C. §1301; United States General Accounting Office, *Principles of Federal Appropriations Law* at 2-11, 2-12, 2-26, 2-27 (1983). Secretary could include in his fiscal year 1985 budget proposal, and could have included in prior budget proposals, such a line item in the Title IV, Discretionary Fund or perhaps other subaccounts that would further allow Secretary to reserve funds for provision to Board.

Meaning and Effect of the Yates Bill

80. Section 111 of Public Law 98-107, 97 Stat. 742 (1983) (the "Yates Bill") provides:

> There is hereby appropriated $20,000,000 to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans," to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the Consent Decree entered in United States District Court in the case of the United States of America against Board of Education for the City of Chicago (80 C 5124) on September 24, 1980.

81. All statutory interpretation begins with the plain language of the statute. *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980):

> Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

82. In plain language, the Yates Bill reveals only a Congressional determination to appropriate $20 million to be provided to Board pursuant to the Consent Decree, prompting

the Executive Branch to take the first step toward fulfilling its obligations under Section 15.1. It reflects no congressional determination as to the total extent of the Consent Decree obligations, the extent of past violations, the adequacy of the $20 million to remedy past violations or the availability of other funds.

83. Legislative history of the Yates Bill supports that plain language interpretation and further refutes any notion Congress intended to render all other funds unavailable to Board. It was passed in its ultimate form only after alternatives that would have had such an effect had been rejected. Evidence of rejected amendments is an appropriate aid to a court considering questions of legislative intent. *Johnson v. Department of Treasury,* 700 F.2d 971, 974 (5th Cir. 1983).

84. In connection with the first draft of the Yates Bill, Congressman Conte submitted an "earmarking" proposal that was intended to render the funds previously restrained by this Court unavailable to Board. Under the Conte Amendment each of the categories of restrained funds was to "be available only to carry out the programs and projects" authorized under the respective legislation creating the programs. H.J. Res. 367, §112, Report No. 98-374, Part I (September 22, 1983). Although that amendment passed the Appropriations Committee, it was rejected by the full House. Executive Branch officials later prepared an alternative to Section 111 (the Yates Bill) of H.J. Res. 368 that would have released the restrained funds to grantees other than Board and would have provided funds to Board only under certain conditions. That alternative, which was submitted to staff members of the House and Senate Appropriations Committees, was also ultimately rejected.

85. In light of his opposition to the Yates Bill and his attempt to alter its effect, any remarks by Representative Conte are entitled to very little weight in construing the statute. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203-04 n.24 (1976). It is well established that statements of opponents to a measure are

poor evidence of legislative intent, *United States v. International Union of Operating Engineers*, 638 F.2d 1161, 1168 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

86. Subsequent as well as contemporaneous congressional action also supports the plain meaning interpretation of the Yates Bill. In its original version the Weicker Amendment, if constitutional, would have expressly achieved the precise result the United States now contends the Yates Bill had already achieved. It must be presumed Congress was aware of its own prior laws, *United States v. Robinson*, 359 F. Supp. 52, 58 (D.C. Fla. 1973), and Congress would not attempt to enact redundant and unnecessary legislation. *See, Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977). Because the original version of the Weicker Amendment was introduced October 4, 1983, a day *before* this Court found the United States' motion based on the Yates Bill to be premature, and because the Weicker Amendment was passed *before* this Court ultimately considered the Government's interpretation, it can hardly be said the Weicker Amendment was a congressional "response" to this Court's interpretation of the Yates Bill. Thus the congressional intent underlying the Yates Bill is further confirmed by this subsequent legislative activity.

87. In addition to being contrary to the plain language and legislative history of the Yates Bill, the United States' proffered construction of that statute would also implicitly reverse the prior determinations of this Court and our Court of Appeals. Given the settled principle that a statute should be construed to avoid questions regarding its constitutionality, *Crowell v. Benson*, 285 U.S. 22, 62 (1932), and because the United States' interpretation would force the confrontation and resolution of substantial constitutional questions, additional reasons for rejecting the United States' suggested reading of the Yates Bill are present.

88. There is no indication Congress intended the Yates Bill to limit the United States' obligation to Board to the arbitrarily-

arrived-at sum of $20 million (there having been no congressional consideration of any of the matters dealt with at such length and painstakingly in these Findings and Conclusions). This Court responded to the enactment of the Yates Bill by freeing up previously frozen funds pro tanto. By so doing it retained other funds as still "available" and thus lessened the degree of confrontation that would have been posed by a decision holding the United States liable for making *all* funds *un* available. Plain legislative language cannot be overridden by the Executive Branch's interpretion of the Yates Bill and its assertion of general principles of construction reflected in certain Comptroller General Opinions (which can only be aids to reasoning, not a substitute for it).

Meaning and Effect of the Weicker Amendment

89. Section 309 of P.L. 98-139, 97 Stat. 895 (1983) (the "Weicker Amendment") provides:

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provision of the order entered by U.S. District Court for Northern District of Illinois on June 30, 1983: Provided, that the Court's decree entered on September 24, 1980 shall remain in full force and effect.

90. As Conclusion 81 reflects, this Court must first examine the language of the legislation and ordinarily must regard that language as conclusive. On its face the language of the Weicker Amendment is not confusing or ambiguous. It is a simple declaration that no fiscal 1983 or 1984 funds appropriated to the Department of Education are to be restrained from distribution to grantees because of this Court's June 30 Order — in street language, it seeks to unfreeze previously frozen funds.[44] It does not at all address the availability of funds to be provided

[44] This discussion does not address any questions of *validity* of such an enactment—only its *meaning*.

pursuant to Section 15.1. It does not purport to limit "grantees" to some subset of persons or organizations eligible to receive Department funding. Importantly (and obviously because of concerns as to constitutionality) it does provide the Consent Decree is to remain in "full force and effect."

91. When a party argues a statute has a meaning that transcends its explicit language, that party bears the burden of showing clear legislative intent that such a contrary meaning was intended. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 158 n.3 (1981) (per curiam). Because the United States contends the Weicker Amendment has some meaning beyond the plain language of the statute, it bears that burden. And because the doctrine disfavoring repeals by implication has been held to apply "with full vigor" when a subsequent law is an appropriations measure, *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 783, 785 (D.C. 1971), the United States also faces that additional burden when arguing the Weicker Amendment was intended substantively to alter the statutory availability of funds to Board.

92. As the following Conclusions confirm, the legislative history of the Weicker Amendment does not conflict with the plain language interpretation reflected in Conclusion 90. Instead the legislative history reinforces that plain language, with its negation of any effort to alter the substantive rights as between the United States and Board.

93. On October 4, 1983 (after the Yates Bill had become law on October 1) Senator Weicker offered the following provision as an Amendment to the Fiscal Year ("FY") 1984 Labor, Health and Human Services and Education Appropriations Bill:

> No funds appropriated in any act to the Department of Education for fiscal year 1983 and 1984 other than those appropriated by Section 111 of the Public Law 98-107 shall be available to fund the Consent Decree of 1980

between the United States and Board of Education of the City of Chicago.

Cong. Rec., S. 13506.

94. That language, which would (if valid) have had an important impact on the rights that are at the core of this opinion, was never enacted into law. Instead Senator Weicker *withdrew* that language, and on October 4 the Senate passed the Weicker Amendment as quoted in Conclusion 89. Its sponsor, Senator Weicker, explicitly stated his proposal "would not release the Government from any further liability" and "if additional funds are required to satisfy this case..., we will certainly do whatever we can to provide these funds..." *Cong. Rec.*, S. 13507, 13535, October 4, 1983. Both the plain language of the Weicker Amendment and its legislative history (Senator Weicker's own statement and the matters reflected in the following Conclusions) reflect (a) congressional ratification of the United States' Consent Decree obligation and (b) congressional recognition of this Court's power to determine the nature and scope of that obligation.

95. On October 4 Representative Conte presented an amendment to H.R. 3959 that contained the extremely specific language required for earmarking. *Cong. Rec.*, H. 7973. Representative Conte's proposed amendment, like the *original* version of the Weicker Amendment, clearly purported to render the restrained funds unavailable to Board. Then on October 8, *after* the Senate had rejected the original version of the Weicker Amendment (thus rejecting the equivalent of Congressman Conte's proposal) and had adopted the Weicker Amendment in its ultimate form, Representative Conte decided not to propose his earmarking amendment to the House.

96. On October 13 the FY 1983 Labor, Health and Human Services and Education Appropriations bill was considered in joint conference committee. Substitute bill language for the Weicker Amendment and possible report language for

inclusion in the Conference Committee Report were circulated by Representative Conte to members of the Committee. In conjunction with those documents, a report called "Talking Points" was also transmitted to Committee members.

97. Those "Talking Points" urged that substitute language be inserted in the Weicker Amendment "because Section 308 literally only directs that the funds no longer be enjoined; it does not address whether the funds must be awarded to the recipients selected by the Department of Education or to Chicago." Indeed the same document said, "It is possible that the Court — consistent with the terms of Section 308 as currently written — could lift its injunction but then order all or part of the funds to be awarded to Chicago." To respond to those perceived "shortcomings" Representative Conte's proposed substitute statute read:

> No funds appropriated in any act to the Department of Education for fiscal years 1983 and 1984 other than those appropriated by Section 111 of Public Law 98-107 shall be available to fund the 1980 Consent Decree between the United States and the Board of Education of the City of Chicago; *provided*, that such Consent Decree shall remain in full force and effect, and nothing in this provision shall be construed to preclude the appropriation of additional funds for the express purpose of funding such Consent Decree.

To precisely the same effect, Representative Conte's proposed language for insertion in the Committee report read:

> Section 308 is designed to ensure that FY 1983 and 1984 funds enjoined by the Court in the litigation between the United States and the Chicago Board of Education are released for awards to the intended grantees and contractors selected by the Department of Education, These funds were appropriated for worthy projects throughout the country, not for the purpose of funding the Chicago degree [sic].

In the end, however, *neither* the substitute bill language nor the proposed report language was approved. Instead the Weicker

Amendment passed the House in exactly the same form that had been approved by the Senate.

98. Remarks of a single legislator are never given controlling weight in analyzing legislative history. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). When a legislator is opposed to a measure, his remarks are entitled to very little weight. *See, Ernst & Ernst*, 425 U.S. at 203-04 n.24; *International Union of Operating Engineers*, 638 F.2d at 1168. In view of Representative Conte's unsuccessful attempts to alter or oppose the Yates and Weicker Bills so as to render funds unavailable to Board, his remarks are especially poor evidence of legislative intent. By contrast, the *fact* of those unsuccessful attempts is persuasive confirmatory evidence of legislative intent contrary to the abortive efforts.

99. In particular, no significance should be attached to Representative Conte's October 20 statement of his "understanding" of the Weicker Amendment. *See, Cong. Rec.*, H. 8740. That statement apparently was inserted into the Congressional Record by Representative Conte after the House had agreed to adopt the Senate's version of the Weicker Amendment. In view of that effort at revisionist history, coupled with the total failure of Representative Conte to obtain the modifications in Committee that would have implemented Representative Conte's "understanding," it would be especially inappropriate now to impute Representative Conte's "understanding" to other members of Congress.

100. Evidence of the evolution of an enactment, of "the effect of amendments — whether accepted or rejected," is an important tool for discerning legislative intent. *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980). Thus the Senate's modification of the original October 4 version of the Weicker Amendment (which, if constitutional, would have rendered the restrained funds unavailable to Board), as well as the failure of the similar

efforts, particularly by Representative Conte, to modify the Weicker Amendment as passed by the Senate, strongly confirm the statute as passed was *not* intended to render the restrained funds wholly unavailable to Board.

101. Nothing daunted, the United States essays its own attempt at revisionist history. It urges this Court to construe the Weicker Amendment as if it had passed with its original proposed language — or with language Representative Conte tried but failed to have enacted on several occasions. Because Congress did not accede to the United States' proposals to render the restrained funds unavailable to Board, however, this Court will not circumvent the congressional rejection of these provisions, or permit the United States to do so, by interpreting the Weicker Amendment as if those proposals had succeeded rather than failed.

102. In summary, the plain language of the Weicker Amendment thus simply requires the Court to return control of the restrained funds to Secretary — to restore the pre-freeze status quo — but does not dictate how any distribution of the funds should occur thereafter. And the foregoing examination of the legislative history of the Weicker Amendment further supports this plain meaning interpretation of the statute. Essentially the Weicker Amendment reflects a legislative compromise in which Congress specifically rejected any attempt to determine the substantive entitlement of Board or any other potential grantee to the restrained funds, leaving the Consent Decree in "full force and effect" and recognizing the determination was one this Court would be making. In effect the statute thus represented a congressional "separation of powers" determination that the Executive Branch should regain control of the funds, after which the rights to ultimate distribution of the funds would simply be in accordance with law — not dictated by the statute itself.

103. In light of the preceding Conclusions as to the continued "availability" (in Section 15.1 terms) of the funds

now covered by this Court's restraining order, this Court has concluded the restraining order can be terminated. That renders moot any possible conflict between the Weicker Amendment (read properly in accordance with the foregoing Conclusions) and the Constitution. It also responds to the salutary principle that constitutional questions should not be decided in advance of the necessity to decide them. *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). But because of the sharply different interpretation of the Weicker Amendment urged by the United States (and the far more serious, substantial and complex questions of constitutionality that interpretation would raise), it remains important, for the reasons made plain in the following Conclusions, to identify and discuss the relevant constitutional questions and their significance for this opinion.

104. In general Congress has the authority to define by statute the substantive law courts are required to apply. Accordingly when there has been a change in the applicable statutory law after judgment in the lower court but before an appellate or other final decision, the court must dispose of the case according to law existing at the time of its decision. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801). That rule however is subject to the exception that courts will refuse to apply the law in effect at the time a decision is rendered when to do so would result in "manifest injustice." *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974). Among the considerations relevant to the potential for manifest injustice are "the nature and identity of the parties,...the nature of their rights and...the nature of the impact of the change in law upon those rights." *Id.* at 717.

105. Article III of the Constitution vests "the judicial power of the United States" in federal courts. While Congress is vested with broad legislative powers under Article I, it can neither "exceed the limit of its own authority" nor "assume a power which could only be properly exercised by [courts]

because it [is] in its nature clearly judicial." *Kilbourn v. Thompson,* 103 U.S. 168, 192 (1880). Thus "the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress." *Nock v. United States,* 2 Ct. Cl. 451, 457-58, (1867), quoted in *United States v. Sioux Nation of Indians,* 448 U.S. 371, 398 (1980). When Congress regulates functions of the judiciary in a pending case, it walks a line between judicial and legislative authority and exceeds that line if it sets aside a judgment or orders retrial of a previously adjudicated issue. *Id.* at 427-30 (Rehnquist, J., dissenting). Consequently, legislation that "prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide the controversy in the Government's favor" would be unconstitutional. *Id.* at 404.

106. Separation of powers limits the exercise of judicial power by Congress and reflects the Framers' concern for maintaining the independence of the coordinate departments as a bulwark against tyranny. *United States v. Brown,* 381 U.S. 437, 442-43 (1964); *The Federalist* Nos. 47 and 48 (J. Madison).

107. If Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases. L. Tribe, *American Constitutional Law* § 3-5, at 39 (1978). In terms of the separation of powers analysis recently applied by the Supreme Court, such conduct would be an act by one branch of government that "prevents [another branch] from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977).

108. No congressional change in the law can retroactively effect a judicial determination brought to final judgment before that change. *Daylo v. Administrator of Veterans' Affairs,* 501

F.2d 811, 816 (D.C. Cir. 1974). To permit otherwise would destroy the finality and independence of the judicial action. Even when a judgment is not final, "the separation of powers bar a federal court from giving operational weight to a pronouncement by Congress...that what had theretofore been judicially declared as law 'shall be deemed never to have had effect.'" *Cerro Metal Products v. Marshall,* 467 F. Supp. 869, 878 (E.D. Pa. 1978), *aff'd,* 620 F.2d 964 (3d Cir. 1980). That principle also protects the integrity of judicial action and prevents the manifest injustice that retroactive application can cause. *Id.* at 877-79; *See also, Coe v. Secretary of Health, Education and Welfare,* 502 F.2d 1337, 1340 (4th Cir. 1974).

109. In cases involving property rights against the United States, the doctrine of separation of powers (as well as principles of equity) forbids application of a substantive law passed by Congress, pending appeal, that would effectively require a federal court to reverse a judgment entered against the United States. *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872); *see, also Sioux Nation of Indians.*

110. Under the Fifth Amendment property may not be taken without the payment of just compensation. Rights that have become vested by judgment constitute property protected from legislative interference. *McCullough v. Virginia,* 172 U.S. 102, 123-24 (1898); *Daylo,* 501 F.2d at 816. Moreover, contract rights against the United States constitute property protected by the Due Process Clause. *Lynch v. United States,* 292 U.S. 571, 579 (1934). Courts have carefully distinguished situations where congressional action impacts only on unvested statutory rights from those where vested contract rights are effected. *See, deRodulfa v. United States,* 461 F.2d 1240, 1257 (D.C. Cir.), *cert. denied,* 409 U.S. 949 (1972); *Memorial Hospital v. Heckler,* 706 F.2d 1130, 1136-37 (11th Cir. 1983).

111. Any vested cause of action, whether emanating from contract or common law principles, constitutes property beyond the power of the legislature to take away. *deRodulfa,*

441 F.2d at 1257. Similarly an attachment, mortgage or other lien entitling a creditor to resort to specific property for the satisfaction of a claim is a property right protected by the Fifth Amendment. *Armstrong v. United States,* 364 U.S. 40, 44-46 (1960); *Louisville Bank v. Radford,* 295 U.S. 555 (1935).

112. Under either the United States' or Board's interpretations of the Weicker Amendment, that statute purports to require this Court to dissolve its injunction, thus "reversing" a particular judicial order in a particular case. If required to decide this question, this Court might well be forced to conclude that aspect of the Weicker Amendment violates fundamental principles of separation of powers. *Sioux Nation of Indians; Nixon v. Administrator of General Services.* This Court's determination as reflected in Conclusion 103 avoids that problem.

113. However, the United States' strained interpretation of the Weicker Amendment presents serious due process issues that do not afflict Board's (and this Court's) reading. One aspect of those due process problems specifically regards the effect of the Weicker Amendment as interpreted by the United States on fiscal 1983 funds. When those funds were appropriated they became potentially "available" to Board within the meaning of Section 15.1. At the moment the funds so became available, the Executive Branch had an obligation "to make every good faith effort to seek to find and provide" those funds to Board. As such, the United States' Consent Decree duties — and Board's correlative Consent Decree rights — with respect to those funds became fixed in legal terms. Even were it assumed Congress might later alter *statutory rights* as to the availability of those funds, Congress could not, consistent with due process, abrogate Board's *Consent Decree rights* that had already vested both by contract and by judgment. *See, Daylo; Cerro Metal Products; see also, Blackhawk Heating.*

114. Put in a slightly different way, at the time the Weicker Amendment was enacted it was no longer within Congress'

power to affect the United States' duties under the Consent Decree as to the restrained fiscal year 1983 funds. Pursuant to this Court's September 27, 1983 order, the United States had recorded those funds as obligated, with Board as an alternative contingent obligee of the Executive Branch. 31 U.S.C. §1501(a)(6). Availability of funds for a particular purpose is determined at the time of obligation. Once obligated, they were exempt from any later statutory alterations of availability.

115. From still another perspective, the United States' false reading of the Weicker Amendment also appears to run afoul of due process because it would destroy Board's right to satisfy its claim from the funds restrained by this Court. In that sense, the frozen funds are similar to an attachment or lien allowing one to resort to specific property for satisfaction of a claim. Such interests are property rights protected by the Fifth Amendment. *Armstrong.*

116. In addition to the substantial due process questions raised by the United States' interpretation, its view of the Weicker Amendment also poses additional separation of powers concerns not presented by this Court's reading. Under the United States' version, this Court would impermissibly have to give effect to a pronouncement by Congress that "what had theretofore been judicially declared as law shall be deemed never to have had effect." *Cerro Metal Products.* That would place Congress in the position of having crossed the delicate line between legislative and judicial functions by dictating the result in a particular case. According to the United States the Weicker Amendment becomes a "substantive" determination applicable to only the Chicago Board of Education and this lawsuit. While Congress has broad power to legislate with regard to *classes* of cases, its power is far more limited with regard to *individual* cases. *See, Sioux Nation of Indians,* 448 U.S. at 430 (Rehnquist, J., dissenting). Relatedly, the United States' proposed reading also violates the principle that Congress cannot change the applicable law in a pending appeal to

relieve the United States of an unfavorable judgment in a dispute involving property rights. *Klein; see also, Sioux Nation of Indians,* 448 U.S. at 404.

117. Finally, a retroactive application of the United States' position on the Weicker Amendment — creating the fiction that the funds had never been available, so that there had never been a violation — would also result in "manifest injustice" (see Conclusion 104). It would belatedly disrupt an agreed process for vindicating the constitutional rights of Chicago students and reward the contumacious actions of the Executive Branch. It would also redefine Board's mature rights under the Consent Decree and saddle Board with a substantially broader responsibility for financing the Plan. Under the circumstances, it would be wholly improper for this Court to adopt and apply retroactively the United States' skewed interpretation of the Weicker Amendment. *Bradley; Coe.*

118. In summary as to the Weicker Amendment, the United States' interpretation, under which the statute would be a congressional determination that the restrained funds are not now and never were available, is incorrect because (a) it conflicts with the plain language of the Amendment, (b) it conflicts with the legislative history of the Amendment and (c) it would render the Amendment plainly unconstitutional in a number of ways. By contrast the Board's interpretation — that the Weicker Amendment, if constitutional, requires this Court to vacate its restraining order, but does not dictate who should receive the funds — is correct, reflecting the plain language and legislative history of the Amendment. While the Amendment might nonetheless pose constitutional problems, this Court need not reach that question because it is now prepared to lift its restraining order upon issuance of an appropriate order in conformity with this opinion, thereby avoiding any potential conflict with the Amendment.

119. Accordingly neither the Yates Bill nor the Weicker Amendment renders the restrained funds unavailable to be

provided to Board. Furthermore, the $20 million provided to Board pursuant to the Yates Bill does not satisfy the United States' obligations under Section 15.1 nor fully remedy its past violations. That contention, initially made by the United States in its Motion To Dismiss filed immediately after passage of the Yates Bill, and repeatedly reasserted up to the present, is wholly untenable. One primary effect of the language and legislative histories of both the Yates Bill and Weicker Amendment is to reconfirm that the United States has a substantial obligation under Section 15.1, an obligation that has not yet been complied with and that is to be further considered and enforced by this Court.

Additional United States Violations of Section 15.1 and Subsequent Court Orders, and Consequent Remedial Obligations

120. All the following actions, taken by the Executive Branch in connection with Congressional consideration of the Yates Bill, constituted violations of Section 15.1 (see Findings 504-05, 507-09):

(a) In connection with the first draft of the Yates Bill, H.J. Res. 367, the Executive Branch supported Congressman Conte's "earmarking" proposal. That amendment was intended to render the funds previously restrained by this Court unavailable to Board. *See*, H.J. Res. 367, §112, Report No. 98-374, Part I (September 22, 1983).

(b) During Congressional consideration of H.J. Res. 368, Executive Branch officials prepared an alternative to Section 111 in an attempt to secure legislation that would have released the restrained funds to grantees other than Board. That proposed substitute language would have established a $14,600,000 contingency fund to satisfy any final court order against the United States but would have made other fiscal year 1983 funds unavailable for that purpose.

121. All the following actions, taken by the Executive Branch in connection with Congressional consideration of the Weicker Amendment, also constituted violations of Section 15.1 (see Findings 512-18):

(a) On October 4, 1983 the Department of Education prepared the following amendment to the Fiscal Year 1984 Labor, Health and Human Services and Education Appropriations Bill:

> No funds appropriated in any act to the Department of Education for fiscal year 1983 and 1984 other than those appropriated by Section 111 of the Public Law 98-107 shall be available to fund the Consent Decree of 1980 between the United States and the Board of Education of the City of Chicago.

Cong. Rec., S. 13506. That language was proposed by Senator Weicker as amendment number 2277. If it had been enacted and found constitutional, that provision would have rendered the restrained 1983 and 1984 funds unavailable to Board.

(b) After a modified version of the Weicker Amendment that did *not* render the restrained funds unavailable to Board had passed the Senate, the Department of Education prepared and transmitted substitute bill language to conference committee members:

> No funds appropriated in any act to the Department of Education for fiscal year 1983 and 1984 other than those appropriated by Section 111 of Public Law 98-107 shall be available to fund the 1980 Consent Decree between the United States and the Board of Education of the City of Chicago: *Provided*, that such Consent Decree shall remain in full force and effect, and nothing in this provision shall be construed to preclude the appropriation of additional funds for the express purpose of funding such Consent Decree.

If adopted and found constitutional, that substitute language would also have rendered the restrained funds unavailable to Board.

(c) In addition the Department of Education submitted proposed language for insertion in the Committee Report that would have attempted to render the restrained funds unavailable to Board:

> Section 108 is designed to ensure that FY 1983 and 1984 funds enjoined by the Court in the litigation between the United States and the Chicago Board of Education are released for awards to the intended grantees and contractors selected by the Department of Education. These funds were appropriated for worthy projects throughout the country, not for the purpose of funding the Chicago degree [sic].

(d) In conjunction with the substitute bill language and proposed Committee Report language, the Department of Education also prepared and submitted a paper entitled "Talking Points" to members of the Conference Committee. That paper urged adoption of those measures in order to render the restrained funds unavailable to Board.

122. On July 15, 1983 the United States filed with this Court a Report in purported compliance with its reporting obligations under Order 2, 567 F. Supp. at 288. That Report failed to present a discussion of specific steps to be included in the United States' program of compliance with the Order and was hence a willful and bad faith violation of the United States' reporting obligations.

123. In the same way, the alleged Plan of the United States for Supporting the Desegregation Plan of Board of Education of the City of Chicago, filed with this Court November 10, 1983, contained no adequate suggestions at all for remedying the United States' past Consent Decree violations or for providing further funding for the Plan. By submitting that so-called "Plan," the United States willfully and in bad faith violated this Court's October 28, 1983 order.

124. As part of the same ongoing pattern, the United States' activities with regard to the funds restrained by this

Court constitute further willful, bad faith violations of Section 15.1 and subsequent Court orders. Among those violations are:

(a) Despite having preserved the "excess funds" from lapsing, pursuant to this Court's September 27, 1983 order, the United States failed to seek reappropriation of those funds (which do not have any other "intended uses") for provision to Board for implementation of the Plan.

(b) In a like show of obstructionism, the United States has continued to refuse to provide any of the "carry over" funds to Board, despite their clear availability and the absence of even remotely compelling competing needs for these funds.

(c) Similarly, the United States has failed to provide Board any of the previously restrained 1983 funds that became available for distribution to grantees, including Board, pursuant to this Court's November 21, 1983 order.

125. Perhaps even worse than such stonewalling, the United States continues deliberately to flout Section 15.1, the Consent Decree and subsequent court orders by engaging in a broad course of conduct designed to render *un* available funds that could be used, and would go part of the way toward being adequate, for implementation of the Plan. Those actions, which are a continuation of the conduct previously found by this Court to violate Section 15.1, constitute additional willful and bad faith violations and include:

(a) failure of the Executive Branch to request fiscal year 1984 or 1985 funding for Title IV of the Civil Rights Act of 1964;

(b) failure of the Executive Branch to seek fiscal year 1984 or 1985 appropriations for the Discretionary Fund sufficient to provide adequate local desegregation assistance;

(c) failure of the Executive Branch in fiscal years 1984 and 1985 to request any appropriations for the Special Programs and Populations subaccounts currently subject to the Order;

(d) Secretary's prior decision and current intention not to reprogram available funds, or formally to request congressional committee approval to reprogram such funds, into subaccounts from which desegregation assistance could be provided to Board;

(e) the decision of the Department of Education not to provide direct grants to local educational agencies with fiscal year 1984 or 1985 funds under Title IV of the Civil Rights Act of 1964;

(f) Secretary's prior decision and current intention not to set aside any fiscal year 1984 or 1985 funds, including available Discretionary Fund moneys, specifically for Board to support its desegregation program costs;

(g) the prior decision and current intention of the Executive Branch not to seek legislation in fiscal year 1984 or 1985 providing specific appropriations to fund all or any portion of Board's costs of implementing the Plan;

(h) the decision of the Department of Education and the Executive Branch to submit a fiscal year 1985 budget proposal to Congress for the Department that includes earmarking language to render all funds appropriated to the Department in fiscal year 1985 and future fiscal years *un*available to Board for use in implementing the Plan.

126. Most recently, the efforts of the Department of Education to promulgate new Regulations — apparently in direct response to this litigation — designed to render funds unavailable for provision to Board for implementation of the Plan constitute an additional and deliberate violation of Section 15.1 and subsequent court orders. Those proposed regulations, 49 Fed. Reg. 7546-51 (February 29, 1984), are designed to "interpret" statutory eligibility criteria for grants from Secretary's Discretionary Fund in a manner inconsistent with the intent of Congress. In any case they are an attempt to render already available funds unavailable for Board's use.

127. Such persistent violations of the Consent Decree and subsequent court orders by the United States may give rise to remedial obligations that go beyond the particular obligations initially contemplated by Section 15.1. It is a basic equitable principle that a court may devise a remedy that exceeds the terms of a prior agreement between the parties if necessary to make the injured party whole. *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1100 (7th Cir. 1981). Thus a court may impose "additional consistent burdens" designed "to ensure implementation of the decree" when a party to a consent decree has failed to comply with his obligation. *Brewster v. Dukakis*, 675 F.2d 1, 4 (1st Cir. 1982).

128. In like fashion a court, enforcing its order through contempt, may require a contemnor to perform affirmative acts not mandated by an underlying decree. *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1150, 1159 (3d Cir. 1980); *NLRB v. J.P. Stevens & Company, Inc.*, 563 F.2d 8 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Franklin Mint Corp. v. Franklin Mint, Ltd.*, 360 F. Supp. 478 (E.D. Pa. 1973). Equitable power of a court to direct such action, however, is not dependent on a finding of contempt or bad faith. *See, Alexander v. Hill*, 707 F.2d 780, 783 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 260 (1983).

129. As indicated at the outset of this opinion, a consent decree has a double aspect — both as contract as as court order. From the former perspective, a party to an agreement may not flout its obligations or take actions that have the effect of destroying or injuring the right of the other party to receive the benefits of the agreement. *Williston on Contracts* §§670, 1959 (3d. ed. 1978). Though it is always important to ensure accountability, that importance is heightened in the present case, where it is the United States that has so persistently attempted to flout its obligations. *United States v. An Undetermined Quantity, etc.*, 583 F.2d 942, 949 (7th Cir. 1978); *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947).

Board, like any citizen, has the "right to expect fair dealing from [the] Government." *S&E Contractors v. United States*, 406 U.S. 1, 10 (1972); *see also, United States v. 119.67 Acres of Land*, 663 F.2d 1328, 1333 (5th Cir. 1981).

130. All the foregoing discussion creates still another double aspect of the United States' obligations. First, all the particular obligations of the United States detailed in these Conclusions are required as a matter of interpretation of the Consent Decree, viewed both alone and in light of the present circumstances. Second, even were that not the case the United States' violations and efforts to undermine its obligations ought to render performance of the same obligations mandatory as a purely remedial matter.

Present Obligations of the United States

131. This Court's Order 1(b) decided Section 15.1 of the Consent Decree then required the Executive Branch "to take every affirmative step within its legal authority to seek to 'find and provide' desegregation funding to Board, until funding adequate for full implementation of the Plan has been provided." Order 2 then prescribed detailed remedial steps to ensure fulfillment of this obligation. That remedial portion of the Order was vacated by the Court of Appeals to give the Executive Branch an opportunity "to fashion its proposed remedy." Except for the $20 million provided pursuant to the Yates Bill (over the opposition of the Executive Branch), the United States has not taken advantage of the opportunity provided, nor has it given the slightest indication it plans to fulfill its obligations under the Consent Decree.

132. Consistent with Section 15.1 and the parties' Joint Stipulation as to their intentions when they entered into that agreement, it is necessary and proper for this Court again to "interpret" and "apply" the "general obligation on the part of"

the United States "as appropriate in [today's] circumstances" (see Finding 104). Under the present circumstances it is clear that, as a matter of construction of Section 15.1, the United States is bound to take every affirmative step within its legal authority to find and provide adequate financing for the Plan, including steps to provide available funds and steps to render funds available, as detailed in these Conclusions.

133. In another mischaracterization of the issues, the United States argues Section 15.1 could not reasonably be construed to dictate a substantial funding result. That contention wholly misapprehends the nature of the obligation contained in Section 15.1. Section 15.1 essentially directs that a *process* take place, rather than assuring any particular *result* of that process. It does not guarantee Board the United States will provide any sum certain. Instead it requires the United States to undertake the *process* of making every good faith effort to find and provide funds, while the *result* to be obtained is dependent on and limited by other circumstances particularly the amount of funding that is or becomes available as a result of the process and the amount of funding necessary for adequate implementation of the Plan. While those circumstances limit the result to be obtained, they do not limit the nature of the process that the United States must undertake to attempt to achieve the result.

134. Under any circumstances, Section 15.1 imposes a serious and substantial obligation on the United States. *Geisser v. United States*, 513 F.2d 862, 869-71 (5th Cir. 1975), *on remand*, 414 F. Supp. 49 (S.D. Fla. 1976), *appeal after remand*, 627 F.2d 745 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981). Courts have frequently set demanding standards for action by government officials who have entered into consent decrees containing "best efforts" or similar commitments. Such standards have included requiring the provision of available funds and prohibiting or requiring various lobbying activities. Courts have not interpreted such commitments to permit gov-

ernment officials to flout or evade their duties. *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982); *Ricci v. Okin*, 537 F. Supp. 817 (D.C. Mass. 1982). And it would be a travesty of justice to accept the United States' argument that such cases have less force because they involved outrageous conduct by state rather than (as here) federal officials. *See, An Undetermined Quantity*, 583 F.2d at 949.

135. There is another locution that equally illustrates the fallacy in the United States' position. Though the Executive Branch certainly does not retain discretion under Section 15.1 as to *whether* to meet its obligation, so that it may not directly renege on its promise or indirectly undermine it, the Executive Branch does retain broad discretion under Section 15.1 as to *how* to meet its obligation.

136. As to the presently available funds, the Executive Branch has in the past totally distorted the concept of exercise of its discretion. It has persistently searched for ways *not* to meet its obligation to Board rather than for *how* to meet that obligation. As a consequence it has so reduced the availability of funds that sufficient funding to meet its obligation is no longer "available."[45] That there are now severely limited available funds, resulting in apparently severely limited remaining discretion, is the direct consequence of the Executive Branch's deliberate violations of Section 15.1. Nor can credence be given to the Executive Branch's contention that it continues to retain discretion to dispense with those funds otherwise, based on the superficially appealing equitable argument that numerous applicants for those funds will otherwise be disappointed. Those applicants (even though they do not have any legal entitlement to the funds, unlike Board) may have a

[45] Thus, with respect to available funds, the Executive Branch has not even afforded its obligation to Board equal status with its desires to use the funds otherwise. It has not even tried to fund Board's needs in the same proportion as it funded other applicants.

call on the court's equitable conscience, but the Executive Branch does not. It is the Executive Branch that has wrongfully created these circumstances, and it cannot in good conscience invoke the equities as surrogate for the innocent applicants. Nevertheless, under Section 15.1 the United States still generally retains its discretion as to how to meet its obligation, and it need not provide the now-available funds to Board if it renders *other* adequate funds available.

137. Unless the United States so renders other adequate funding available, Board is entitled under Section 15.1 to the available fiscal 1984 funds to the extent necessary adequately to implement its desegregation programs. This result is also required because the United States' past and continuing violations of the Consent Decree have eliminated all alternative sources of available funds and because it is necessary to redress those violations. At a minimum the Executive Branch has historically allocated Title IV and Discretionary Fund moneys disproportionately in favor of other applicants. In prior years other potential recipients of the fiscal year 1984 funds have benefitted from Secretary's violations of the Consent Decree, and the funds now remaining available are not even sufficient to correct that historical imbalance. Even apart from that, Secretary has not created any entitlement in other applicants to those funds in fiscal year 1984, and no number or form of Executive Branch "policy" decisions, "representations" or subsequent "commitments" can undo or override the United States' obligations to Board and indeed to this Court. *See, Geisser; Brewster; Ricci.*

138. Another aspect of the plain meaning of Section 15.1 makes clear the Executive Branch's obligation extends to *legislative* activities, to the extent necessary to insure resources for full implementation of the Plan. Section 15.1 employs the words "find" and "every available form of financial resources." If all that had been intended was to give Board access to *existing* funding sources, the verb "provide" would have done

the job. "Find" imports something more: the *search* for funds. If the United States' obligation did not extend to activities such as seeking reappropriation or new legislation when other sources of available funds prove inadequate, the word "find" would be rendered meaningless. It is a cardinal principle of construction that each provision of an agreement should be given meaning if possible. *Hanley v. James McHugh Construction Co.*, 444 F.2d 1006, 1009 (7th Cir. 1972). And the linked use of the phrase "every available form of financial resources" stresses a "universal search," which necessarily includes legislative initiatives as one aspect of the required effort.

139. Nor is Conclusion 138 speculative, though the language is clear enough. Examination of extrinsic evidence also confirms the Executive Branch's obligation under Section 15.1 extends to lobbying activities. Language proposed as a precursor to Section 15.1 in a June 19, 1980 letter from Assistant Attorney General Drew Days to Board (GX 1-20) shows that the word "available" cannot be read as a term of limitation and that legislative initiatives were contemplated.

140. Moreover, the broad circumstances (see Findings 108-09) surrounding entry of the Consent Decree also indicate the United States' obligation in Section 15.1 extends to lobbying activities. Its financial commitment in Section 15.1 was the principal *quid pro quo* for Board's willingness to forego litigation and develop the Plan. In return for its Section 15.1 commitment the United States secured the full result it sought (and might not otherwise have achieved) without the expense and delay of complex litigation.

141. It would be inequitable to construe the Consent Decree in a way that would mean Board undertook its binding and substantial obligations without any assurance the United States could not completely eviscerate its one obligation through lobbying activity or inactivity. It is a principle of contract construction that an agreement should not be interpreted in a manner that will place one party wholly at the will

or mercy of another. *Padbloc Co. v. United States,* 161 Ct. Cl. 369, 376-77 (1963). It would distort that principle to hold that while Board is bound to its substantial obligations the Executive Branch is free completely to undermine its obligations through lobbying activity or inactivity. No such totally empty promise will be implied by this Court.

142. Viewed either alone or in the present circumstances, Section 15.1 (as a matter of construction) requires the Executive Branch promptly to undertake some combination of the following lobbying activities to the extent necessary to assure financing adequate for implementation of the Plan:

(a) reporting to Congress on the substance of this Court's decision and the need for funds to meet the United States obligation under Section 15.1;

(b) requesting reappropriation of excess 1983 funds, and, at the appropriate time, excess funds in 1984 and subsequent years;

(c) requesting reappropriation of Guaranteed Student Loan or other 1984 Department of Education Funds;

(d) requesting supplemental 1984 Department of Education appropriations for use in meeting its obligations to Board;

(e) seeking fiscal year 1985 appropriations;

(f) taking any other legislative initiatives that the Department, using "every good faith effort," can identify that might result in rendering funds available to Board; and

(g) opposing any legislative initiatives designed to render funds *un*available for provision to Board.

143. As for Conclusion 142(a), the Executive Branch and specifically the Department of Education are required by statute to submit reports to Congress conveying similar information. *See,* 20 U.S.C. §3486; 31 U.S.C. §§1105, 1108. As for the remaining activities described in Conclusion 142, they

represent the Executive Branch's minimum obligations with respect to legislative initiatives consistent with the terms of Section 15.1, either on its face or as interpreted in light of the present circumstances. Of course the Executive Branch retains discretion to choose among those potential legislative initiatives, so long as it exercises that discretion in a manner so as "to make every good faith effort" to "find" adequate financing.

Separation of Powers:
Judicial Consideration of Legislative Activities

144. Separation of powers doctrine serves "to check the extent of power exercisable by any one branch of Government in order to protect the people from oppression," *Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 471 (D.C. Cir. 1982), *aff'd*, 103 S.Ct. 3556 (1983). That doctrine was adopted "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 292-93 (1926) (Brandeis, J., dissenting). It does not require "three airtight departments of government." Rather the doctrine is flexible, and the measure of conformance to its principles is pragmatic. *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-43 (1977).

145. To determine whether an act of one branch of government disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which the act prevents another branch from accomplishing its constitutionally assigned functions. Only if that threshold inquiry reveals the potential for disruption will a court then examine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of the first branch. *Id.* at 443.

146. Enforcement of the Consent Decree by foreclosing certain narrow legislative activities by the Executive Branch, and requiring certain others, involves no disruption of lawful

Executive Branch activities. Nor does it disrupt the balance between coordinate branches, because the Executive Branch itself properly exercised its own constitutionally assigned power when it chose to enter into the Consent Decree. Enforcement of the Executive Branch's own voluntary decision is not an unwarranted "disruption" of the exercise of its powers. *See, id.; Citizens for a Better Environment v. Gorsuch,* 718 F.2d 1117, 1127-30 (D.C. Cir. 1983); *Gautreaux v. Pierce,* 690 F.2d 616, 637-38 (7th Cir. 1982); *Alliance To End Repression v. City of Chicago,* Nos. 83-1853, 83-1854, slip op. at 8 (7th Cir. February 23, 1984).

147. Enforcement of the full substance of the United States' commitment in Section 15.1 is further justified by the "overriding need" to protect the constitutional rights of Chicago students and the integrity of the Judicial Branch itself. *Nixon v. Administrator of General Services; see also, Marbury v. Madison,* 5 U.S. (1 Cranch) 133, 163, 177 (1803); *An Undetermined Quantity, Etc.,* 583 F.2d at 949.

148. Nor do the legislative activities of the Executive Branch in the circumstances of this case present "political questions" that may not be considered by this Court. *Baker v. Carr,* 369 U.S. 186, 217 (1962), defines the criteria for evaluating the applicability of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for revolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

149. That doctrine's first strand — "textually demonstrable constitutional commitment" — has been carefully and narrowly applied. In many instances, the exercise of powers that initially appear to be committed to another branch by the Constitution have been found not so committed and subject to review by the courts. *See, Powell v. McCormack,* 395 U.S. 486 (1969); *Roudebush v. Hartke,* 405 U.S. 15 (1972).

150. Article II, Section 3 of the Constitution provides in part:

> Section 3. He shall from time to time give to the Congress information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient....

That provision establishes the duty of the President to recommend measures to Congress, thereby giving him a positive role in the legislative process. Its purpose is to "make it plain that it is not an officious intrusion upon the functions of the legislative branch, violative of the principle of separation of powers, when the President proposes a program of lawmaking ..." E. Dumbauld, *The Constitution of the United States* 311 (1964).

151. Article II, Section 3 addresses and clarifies a separation of powers issue not at all implicated in the present case. It establishes the Executive's duty and ability to recommend matters to Congress. It does not however address the accountability of the Executive Branch for its failure to meet an independent obligation to do so, nor does it excuse that failure. It assures only that fulfillment of an obligation such as that owed to Board does not violate the doctrine of separation of powers. Accordingly Article II, Section 3 does not constitute a "textual commitment" of Executive Branch legislative activity in these circumstances.

152. As Conclusions 138-43 make plain, the Executive Branch's Section 15.1 commitment to Board (and to this Court as well) effectively reflects a determination that if sufficient

presently available funding could not be provided, it would become "necessary and expedient" to undertake legislative initiatives. That determination represented a proper exercise of the Executive Branch's discretion and a voluntary limitation on the future exercise of that discretion. *See, Citizens for a Better Environment v. Gorsuch; Covelo Indian Community v. Watt,* 551 F. Supp. 366, 378 & n. 9 (D.D.C. 1982), *aff'd,* Docket Number 82-2377 (D.C. Cir. December 21, 1982), *vacated as moot,* Docket Number 82-2377 (D.C. Cir. February 1, 1983).

153. Such Executive Branch agreements to particular restrictions on the exercise of its "executive" powers are proper and can be enforced. *Gautreaux v. Pierce,* 690 F.2d at 637-38; *Alliance To End Repression,* slip op. at 8. Selfimposed restraints of this type do not impermissibly infringe upon Executive Branch discretion. *Citizens for a Better Environment v. Gorsuch.* Indeed the United States' ability to restrict itself and enter into binding commitments is a "competence attaching to sovereignty." *Perry v. United States,* 294 U.S. 330, 353 (1935), rejecting the contention (much akin to that the United States seeks to advance here) "that the Government cannot by contract restrict the exercise of a sovereign power."

154. Board's rights against the United States are embodied in a consent decree, a judgment that can be fully enforced by this Court. *United States v. City of Miami,* 664 F.2d 435, 439-40 (5th Cir. 1981)(per curiam). Even were Section 15.1 viewed as a simple contract, the United States' promise would remain fully enforceable (though in that event enforcement might be relegated to the Claims Court, 28 U.S.C. §1491(a)(1)). Litigation to enforce government contracts recognizes both (a) the general potential for contractual liability even when the United States exercises "sovereign" powers and (b) the specific "validity of a duty to obtain funds" when the United States contracts to do so. *Municipal Leasing Corp. v. United States,* 1 Cl. Ct. 771, 774 n.2 (1983); *S.A. Healy Co. v. United States,* 576 F.2d 299, 306-07 (Ct. Cl. 1978); *D & L*

Construction Co. and Associates v. United States, 402 F.2d 990, 999 (Ct. Cl. 1968)(per curiam); *Gerhardt F. Meyne Co. v. United States,* 76 F. Supp. 811, 815 (Ct. Cl. 1948).

155. This and the next two Conclusions confirm that no other characteristics of a nonjusticiable political question are present in this case. There are "judicially discoverable and manageable" standards for evaluating the Executive Branch's legislative activities. *Baker v. Carr.* Its specific actions to meet its commitment to Board will be empirically verifiable, for terms such as "every good faith effort," which describes the Executive Branch's duty, are frequently used to describe legal obligations and are routinely enforced by courts. *See, United States v. McAndrew,* 480 F. Supp. 1189, 1193 (E.D. Va. 1979) (order requiring "reasonable efforts" sufficient to support contempt finding).

156. Enforcement of the Executive Branch's duty to make legislative initiatives will not involve this Court "in policy decisions". *Baker v. Carr.* It was the Executive Branch itself that decided the then-contemplated litigation with Board should be settled immediately on the terms embodied in the Consent Decree. This Court's enforcement of that agreement does not involve it in evaluation of the policy judgments of the Executive Branch. *See, Citizens for a Better Environment v. Gorsuch.*

157. Finally in the "political question" analysis, judicial enforcement of the Executive Branch's commitment does not show any "lack of deference" to a coordinate branch of Government. *Baker v. Carr.* Quite the opposite is true. Throughout these proceedings, the considerable deference shown the Executive Branch by both this Court and Board has been consistently exploited by the United States' obstructionism. Under the circumstances, it is entirely proper for this Court to enforce the full substance of the United States' obligation.

Means of Enforcement

158. At this point the rights and duties of the parties have been defined. It remains to address the most appropriate means of enforcement. This opinion is not accompanied by an order for three reasons:

(a) to enable the parties to consider the full scope and implications of this opinion:

(b) to enable the United States (consistently with the forebearance this Court and the Court of Appeals have previously extended to it as a litigant) promptly to advise this Court and Board of its response to its obligations as defined in these Findings and Conclusions; and

(c) to enable the parties promptly thereafter to tender proposals for an appropriate order.

Nonetheless it makes good sense now to address some aspects of the enforcement issues.

159. Because the United States failed to provide available funds or adequate funding to Board for school year 1983-84, and because the United States otherwise failed to comply with its obligations for that school year under the Consent Decree and as determined by this Court and the Court of Appeals, the United States has not yet effectively begun to meet its funding obligations.

160. These Findings and Conclusions have often made reference to the Executive Branch. But the litigant here is the United States, and the Consent Decree is a binding obligation of the United States as such, not of the Executive Branch (which is after all not a legal entity). As established in these Findings and Conclusions, the Executive Branch has persistently sought to render funds *un*available to Board, and it has succeeded in so limiting the current availability of funds that it has undermined the United States' ability to comply fully with

the obligation contained in Section 15.1. Considering those violations, by which the Executive Branch has deliberately disabled itself from complying with Section 15.1, this Court now determines the current obligation of the United States remains one of providing Board with an amount adequate for implementation of the Plan in school year 1984-85. As Conclusion 158 indicates, considerations of comity and separation of powers dictate that this Court defer (briefly, to be sure) its determination as to the means necessary to ensure that the Executive Branch will attempt to meet that obligation.

161. To be entitled to permanent injunctive relief, a plaintiff not only must prevail on the merits of its claim but also must carry the burden of what "is often referred to as 'balancing the equities' or as drawing the 'balance of convenience.'" 7 *Moore's* 65.18[3], at 65-136. As the Supreme Court put it in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959):

> The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.

Moore's explicitly, and *Beacon Theatres* implicitly, suggests the District Court considering a permanent injunction could well apply the same criteria our Court of Appeals has consistently announced as required for preliminary injunctive relief (*Godinez v. Lane*, No. 83-3094, slip op. at 14 (7th Cir. May 9, 1984)), of course substituting actual victory on the merits for a mere reasonable likelihood of success.

162. Application of those principles to the present case demonstrates Board has borne its burden with regard to each of those criteria:

(a) Board has prevailed on the merits of its claim and has established that the United States has violated and continues to violate its binding and enforceable obligations under the Consent Decree.

(b) Board has demonstrated the balance of equities weighs in favor of the grant of injunctive relief, inasmuch as:

(1) Board has no adequate remedy at law.

(2) Board faces irreparable injury in the absence of injunctive relief, because it will most likely be unable to meet its Consent Decree obligations absent such relief and because its Consent Decree obligations will be effectively varied and enlarged.

(3) No substantial hardship is imposed on the United States by the grant of permanent injunctive relief directing compliance with the Consent Decree to which it voluntarily agreed. Any hardship certainly does not outweigh the injury to be inflicted upon Board if such an injunction is not granted.

(4) Surely the public interest is best served by granting permanent injunctive relief. In particular, the public interest in assuring full and adequate implementation of the Plan, in preserving the integrity of the Consent Decree and in protecting the dignity and power of this Court would be served.

(c) There should be no difficulty in shaping a form of injunctive relief that is appropriate, narrowly tailored and adequate to protect Board's rights.

Accordingly, Board satisfies all of the requirements for permanent injunctive relief.

Milton I. Shadur
United States District Judge

Date: June 8, 1984

592 F.Supp. 967(1984)

UNITED STATES of AMERICA, Plaintiff,

v.

BOARD OF EDUCATION of the CITY OF CHICAGO, Defendant.

No. 80 C 5124

United States District Court, N.D. Illinois, E.D.

August 10, 1984.

Remedial Order August 13, 1984

SUPPLEMENT TO REMEDIAL ORDER

SHADUR, District Judge.

One of the keen insights of the late, great constitutional scholar, Professor William Winslow Crosskey, author of the two-volume Politics and the Constitution in the History of the United States, is that our country has really undergone two revolutions, rather than the usually-understood one revolution. First of course was the Founding Fathers' violent over-throw of Great Britain's system of absolute autocracy, as portrayed in the stirring words of the Declaration of Independence. Second, though seldom thought of as a revolution because it was marked by a peaceful "overthrow" (in a figurative sense), was the consensual Constitutional Convention of 1787. It replaced the unsatisfactory melange of independent states that had existed under the Articles of Confederation with the concept of Federalism, including a strong national government. But the strong national government was one with checks and balances, with power divided among its three branches rather than focused in a single head.

Now two centuries later we appear to have come full circle, with the United States voicing in this lawsuit theories of

government that almost beggar the excesses that triggered the first Revolution—that conjure up images of an imperial Executive Branch exemplified in Louis XIV's "L'etat c'est moi": "The state, it is I." We have in this case a solemn contractual undertaking in the form of a consent decree. It was entered into voluntarily by the United States the day this lawsuit was first filed in September 1980. This Court has held over a year ago, and our Court of Appeals has confirmed over ten months ago, that the United States is obligated by contract—it is firmly committed—"to find and provide every available source of financial resources adequate for the implementation of [the Board of Education's] desegregation plan."

Instead what the United States has done is to stonewall. What the United States says before this Court is that the promise of the United States is worthless:

1. Though the consent decree is a contract entered into by the United States through its Department of Justice, the United States now says it does not bind the President. It is said to be ultra vires, outside the power of the Attorney General of the United States who authorized it in September 1980, and is therefore an empty promise.

2. Alternatively, if the firm promise of the United States by its highest law officer can bind the President, the United States says it bound only President Carter. Why? Assertedly because no President can commit the United States and bind his successor—a concept that is the epitome of the personalized, imperial presidency.

If it is thought this characterization is overstated, it is only necessary to read the anarchic document filed by the United States in response to this Court's detailed June 8 Findings and Conclusions, which had cited chapter and verse describing the United States' stubborn non-compliance. If the kind of "state paper" that has been tendered to this Court by the United

States were issued in the international arena, the word of the United States would be bankrupt in the world—or perhaps this Court is naive, and totalitarian governments might instead respond positively to such an expression, because they would recognize that kind of United States as one of their own.

Almost exactly midway between the first great Revolution and today, just over a century ago, our Supreme Court—surely a conservative one by today's standards—said in United States v. Lee, 106 U.S. 196, 220, 1 S.Ct. 240, 260, 27 L.Ed. 171 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

Now the United States seeks to flout that principle as well as its contractual undertakings under the consent decree. That intransigence, that defiance of law, is impermissible in a government of law. To hold the United States to nothing more than its bargain does not violate the separation of powers, as the United States would have it, but rather fosters the rule of law this Court has sworn to uphold in its oath to support and defend the Constitution. This Court does not intrude on the Executive Branch. Rather the Executive Branch has committed itself to a contract in the exercise of its discretion, and it is to be held responsible for that decision.

For that reason this Court is entering its Remedial Order today.

REMEDIAL ORDER

This Court has considered the Petition filed by the Board of Education of the City of Chicago ("Board"); Board's Motion for Further Declaratory and Injunctive Relief; the full record in this litigation to date; this Court's June 30, 1983 Findings of

Fact, Conclusions of Law and Order ("Opinion II" or "June 30 Order"); the Court of Appeals Opinion of September 9, 1983 "Opinion III"); and the evidence and memoranda received in connection with the hearing held March 20-29, 1984. In accordance with the Opinion, Findings of Fact and Conclusions of Law entered by this Court June 8, 1984 ("Opinion IV," "Findings" and "Conclusions"), 588 F.Supp. 132, which are specifically made part of this Remedial Order, it is hereby ORDERED, ADJUDGED AND DECREED:

1. This Court has subject matter jurisdiction to declare and enforce the rights and obligations of the parties under the Consent Decree approved by and entered as a judgment of this Court September 24, 1980. This Court had jurisdiction pursuant to 28 U.S.C. § 1331 and § 1345 to approve and enter the Consent Decree, has continuing jurisdiction under these statutes and has retained jurisdiction by the terms of the Consent Decree to interpret, apply and enforce its provisions.

2. In June 30 Order ¶ 1b this Court determined that Section 15.1 of the Consent Decree (hereafter simply "Section 15.1") imposes a substantial obligation on the United States, pursuant to which "the Executive Branch of the United States is now required to take every affirmative step within its legal authority to seek to 'find and provide' desegregation funding to Board, until funding adequate for full implementation of the Plan has been provided." This Court further concluded the United States had violated its obligations under Section 15.1. (June 30 Order ¶ 1 and Opinion II Conclusions 4, 8, 9, 10) On September 9, 1983 the Court of Appeals affirmed, inter alia, the determination that Section 15.1 imposes a substantial funding obligation that had been violated by the United States. Essentially because it considered the United States should be given the benefit of the doubt rather than assuming continued noncompliance, the Court of Appeals concluded this Court had "acted with excessive dispatch in delineating specific remedies."

(Opinion III, 717 F.2d 378 at 384-85) Accordingly the Court of Appeals noted that a hearing was to be held to determine the amount of funding adequate for the Plan, and held this Court should give the United States "an opportunity to fashion its proposed remedy for past noncompliance, as well as a chance to show that it intends to comply in the future, before structuring detailed remedial action that may still be necessary." (Opinion III, 717 F.2d at 385)

3. Since the June 30 Order and since the Court of Appeals decision, the United States has been given several such opportunities—far more than the benefit of the doubt called for by the Court of Appeals. Nevertheless, the United States has not remedied its violative conduct, but has instead continued its pattern of non-compliance. As detailed in Opinion IV, the Executive Branch of the United States has adopted and carried out a policy to deny funding to Board for implementation of its Desegregation Plan. In particular, the Executive Branch has:

(a) failed to provide available funds to Board;[1]

(b) lobbied in Congress against legislation specifically designed to make funds available to Board;

(c) lobbied in Congress in support of legislation drafted by the Department of Education and specifically designed to make available funds unavailable; and

(d) otherwise acted to render funds unavailable to Board, and failed to take actions to render additional funds available. Moreover the United States also presented to this Court on

[1] In accordance with the direction of the Court of Appeals, this Court has verified the availability for provision to the Board of funds appropriated in fiscal years 1983 and 1984 to the Secretary's Discretionary Fund and the Special Programs and Populations Account of the Department of Education. See Findings 401-32 and Conclusions 65-114.

November 10, 1983 a "Plan" that merely reiterated the United States' arguments against providing funds, and that made clear the Executive Branch did not intend either to remedy or alter its pattern of non-compliance with the Consent Decree. That represented a willful flouting of Opinion III and the Court of Appeals' invitation "to fashion [the United States'] proposed remedy for past non-compliance, as well as ... to show that it intends to comply in the future ...."

4. Since the entry of Opinion IV, the United States has taken no steps to find and provide federal funding for Board's Desegregation Plan (the "Plan"). Instead, on June 26, 1984 the United States filed with this Court a "Report" that again repeats its arguments against providing federal funding for the Plan, many of which have already been rejected by the Court of Appeals. That "Report" again demonstrates forcefully that the United States does not intend either to remedy or to alter its pattern of non-compliance with the Consent Decree. Additional reasons for this Court's now granting declaratory and permanent injunctive relief are detailed in Opinion IV.

5. This Court determines that since Opinion II the United States has again persistently violated the Consent Decree and, in particular, has wilfully and intentionally taken actions specifically deisgned to render funds unavailable for provision to Board. In direct violation of the decisions in Opinion II affirmed by the Court of Appeals in Opinion III, and in direct contravention of the predicate for Opinion III's granting a further opportunity to the United States, the Executive Branch has wholly failed to make the good faith efforts to find and provide funds required by Section 15.1, but has instead consistently acted in bad faith, seeking to deny funding to Board and to undermine the ability of the United States to comply with Section 15.1.

6. Based upon the determinations in Paragraphs 3-5, it is now appropriate for this Court: (a) to determine the level of expenditure adequate for implementation of the Plan for school year 1984-85, (b) to determine the portion of that amount for which the United States is responsible, and (c) to structure detailed enforcement and remedial injunctive relief necessary to insure that the United States' obligations under Section 15.1 are fulfilled. By this Order this Court does not award damages, or any relief in the nature of damages, to Board. Rather this Order grants only prospective, equitable relief, particularly with respect to the upcoming school year, providing specific injunctive relief to compel the United States to meet its obligations under the Consent Decree.[2] To the extent the relief detailed below goes beyond the specific terms of Section 15.1, such added relief is specifically made necessary by the United States' violations that have deliberately undermined its ability to comply now or in the future with Section 15.1, in turn requiring this Court to fashion further equitable relief to assure that the results contemplated by the Consent Decree are achieved in spite of the United States' intransigent attempts to undermine it. (See Conclusion 127)

7. This Court determines and declares the level of expenditure "adequate for the implementation of the Desegregation Plan," within the meaning of Section 15.1, in school year 1984-85 is $171.631 million. That amount, determined in accordance with Findings 201-72 and 301-76, includes the costs of implementing both the educational components and student

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[2] Board's proposed order requested this Court to grant relief in addition to the relief provided in this Order. As discussed in court on August 10, 1984, this Court has taken those proposals under advisement and requested additional memoranda from the parties concerning the propriety of the additional proposed relief. This Court will enter a further remedial order granting whatever additional relief is appropriate promptly after receiving those memoranda.

assignment aspects of the Plan.[3] This is not a determination that the amount provides for full implementation, or represents the limits of what may be adequate, or that a lesser amount would be constitutionally impermissible. Rather it is a determination that the evidence presented demonstrates $171.631 million is the reasonable cost for school year 1984-85 of Board's Plan implementation programs that have been shown:

> (a) to be within the programmatic framework delineated in the Consent Decree and Plan that the United States has agreed to and endorsed and that this Court has previously approved; and
>
> (b) to represent a reasonable exercise of Board's discretion to adopt programs that materially aid the implementation of the Plan and, indeed, to be carefully designed to redress substantially the effects of past segregation and assure successful implementation of the Plan.

8. In accordance with Findings 301-76, this Court determines Board has continued since June 30, 1983 to make every good faith effort to find and provide funds. This Court concludes Board, despite its good faith efforts, cannot under present circumstances provide more than $67.773 million in incremental desegregation expenditures[4] for Plan implementation in school year 1984-85 will be fulfilled if it provides $67.773 million. Board remains obligated to take all steps within its legal authority to attempt to find new external sources

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[3] Evidence at the hearing indicates approximately the same amount is expected to be necessary in each of the succeeding school years. As to school years subsequent to 1984-85, the present determination by this Court is intended to provide guidance to the parties for planning future efforts to provide funding. It is not a final determination; such a determination may require further hearings as those school years approach and Plan implementation progresses. See Paragraph 15.

[4] This Court recognizes, as indicated in Findings 313-17, that there are substantial ancillary desegregation expenditures that are not taken into account by the figures in this Order.

of degregation funding for 1984-85 and for subsequent school years.

9. Considering the level of expenditure adequate for Plan implementation set forth in Paragraph 7, the amount of funds available to Board set forth in Paragraph 8, the amount of funds available and potentially available to the United States, and an equitable allocation of costs among the parties under present circumstances, this Court determines and declares the United States' share of the total amount adequate for implementation of the Plan in school year 1984-85 is $103.858 million.[5]

10. This Court determines and declares the present obligation of the Executive Branch of the United States[6] is to take every step within its legal authority, as detailed in Conclusions 131-43, to find and provide $103.858 million for implementation of the Plan for school year 1984-85.[7]

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[5] In this respect the United States has advanced various limiting contentions that have been rejected by this Court. In particular, the obligation of the United States is not predicated upon the prior exhaustion by Board of its general resources, and is not limited by the amount of funds that might have been provided under the ESAA program, which the United States has repealed since entering into the Consent Decree. Nor may the United States' obligation be deemed fulfilled by funds or increase in funds, such as ECIA Chapter 1, that are provided to school districts generally for non-desegregation purposes.

[6] For purposes of this Order the Executive Branch of the United States includes, but shall not be limited to, the Department of Education, the Department of Justice, the Office of Management and Budget and any other personnel or agencies of the Executive Branch whose participation is necessary for successful implementation of this Order.

[7] This is the fundamental obligation contained in Section 15.1. Even if every aspect of this obligation had not been contained in Section 15.1, each aspect is now independently mandated as a result of the need to remedy the violations of the Consent Decree.

11. As discussed in Conclusion 160, the Consent Decree is a binding obligation of the United States as such, not of the Executive Branch. Considering the violations of the Consent Decree and subsequent court orders, by which the Executive Branch has persistently and successfully sought to limit the current availability of funds, it is now extremely unlikely the Executive Branch can find and provide $103.858 million through the process referred to in Paragraph 10. Rather the Executive Branch violations have willfully and completely undermined the ability of the United States to comply fully with the Consent Decree through the process and have "poisoned the well." As the parties have stipulated (Finding 110), Section 15.1 creates a general obligation to "be interpreted and applied as appropriate in whatever future circumstances might arise." Today's "circumstances," and particularly the presently-existing limitations, are in large part defined by these continuing egregious violations by the Executive Branch. Interpreting and applying Section 15.1 in light of these present circumstances, particularly considering the need to fashion equitable relief to assure implementation of the Decree despite such violations, this Court further determines the United States has an unconditional obligation to provide Board with $103.858 million for implementation of the Plan in school year 1984-85.[8]

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[8] Although Board's original Petition in this matter initially requested an order compelling the United States' performance of the process required by Section 15.1, this Court determines and declares the Consent Decree can be enforced against the United States under the present circumstances only by imposing the mandatory duties specified herein. Because of the United States' recalcitrance in failing to initiate the Section 15.1 process, its unremitting repudiation of the Consent Decree obligation, and its subversion of the Section 15.1 process by making appropriated funds unavailable, it is no longer appropriate nor feasible to specify only a process mechanism for providing relief to Board. Under these extraordinary circumstances,

Footnote continued on following page.

12. Board cannot fully enforce the United States' Consent Decree obligation, nor can it obtain complete relief for the United States' violations, absent receipt of the $103.858 million in time for its use in school year 1984-85. All the evidence presented at the most recent hearings demonstrated that sum had to be received by Board no later than June 30, 1984 to enable Board most effectively to implement its Plan programs in school year 1984-85. It is particularly critical that no less than $20 million be provided by August 22, 1984, to allow Board to continue the degregation programs initiated during the last school year with funds received pursuant to the Yates Bill, which programs cannot otherwise be funded by Board. Board has represented, and there is no reason to doubt, that if Board does not receive that $20 million, programs serving tens of thousands of children will be terminated 550-600 teachers and other staff will be discharged and, due to seniority provisions, hundreds of other teacher displacements will occur.

13. Considering that Board needed (and that the United States knew of such need) to receive the funding no later than June 30, 1984, and that the United States has had ample opportunity to undertake the process referred to in Paragraph 10 (and again detailed with respect to future years in Paragraph 15), but has repeatedly refused to do so, this Court now orders and permanently enjoins the United States to take the following actions. Its Executive Branch is directed to undertake the process of taking every step within its legal authority to find

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Footnote continued from preceding page.

this Court's authority to provide additional relief against the United States is derived from Board's request for effective enforcement of this Court's original judgment (the Consent Decree) and this Court's interest in ensuring—indeed its duty to ensure—that its orders and judgments are not flouted by parties to a judicial proceeding. Consequently, this Court is empowered and obligated to effect enforcement of the Consent Decree, a prior judgment and mandate of this Article III court.

and provide funding for school year 1984-85 and future years (of course it retains discretion to provide adequate funding from whatever sources of funding are now or are rendered available). However, considering the matters referred to in Paragraphs 11 and 12, if that process does not result in providing $103.858 million by August 22, 1984, the United States is ordered and permanently enjoined to provide the then-available funds, and as part thereof to take the remedial steps set forth in Paragraph 14, by August 22, 1984.

14. To the extent the United States refuses or fails to provide to Board on or before August 22, 1984, all of its $103.858 million Consent Decree obligation for implementation fo the Plan in school year 1984-85, this Court orders and permanently enjoins the United States, its agents, officers and employees, including the Department of Justice and Attorney General of the United States William French Smith and its other agents, and the Department of Education and its Secretary Terrel Bell and its other agents, pursuant to Fed.R.Civ.P. ("Rule") 65, to undertake the following actions on or before August 22, 1984:

(a) every step necessary to obligate and provide immediately to Board the $17.0 million in the Secretary's fiscal year 1984 Discretionary Fund that are currently restrained by previous Orders of this Court (solely to permit the Secretary to provide such funds to Board for implementation of its Plan, all prior orders restraining obligation of the $17.0 million in the Secretary's fiscal year 1984 Discretionary Fund are vacated contemporaneously with such provision of funds to Board); and

(b) every step necessary to obligate and provide immediately to Board $11.775 million of the $24 million allocated to the the Title IV subaccount of the Depart-

ment of Education's Special Programs and Populations Account for fiscal year 1984, which are also currently restrained by previous Orders of this Court (such funds may be used by Board only for implementation of those programs identified in Opinion IV as statutorily eligible for Title IV funding; and solely to permit the Secretary to provide such fiscal year 1984 funds for the Board's Title IV eligible desegregation programs, all prior orders restraining obligation of $11.775 million, only, in the fiscal year 1984 Title IV subaccount of the Special Programs and Populations ("SPP") account are vacated contemporaneously with such provision of funds to Board).

15. To fulfill its obligations under the Consent Decree and this Order for school year 1985-86 and for subsequent school years, the United States must formulate an affirmative program in consultation with Board on or before October 1 of the year preceding each next upcoming school year (for example, October 1, 1984 for school year 1985-86). Each such affirmative program shall identify programs that will materially aid implementation of the Plan in that year, shall state the nature and amount of funding that each of the parties can provide for that year, and shall specifically identify the affirmative steps the United States will undertake in its process of finding and providing funds. Among the actions to be taken by the United States in formulating and executing such affirmative program in each upcoming school year are the following, to the extent necessary to assure that up to $103.858 million[9] is placed in the escrow account referred to in Paragraph 15(i):

(a) identify any funds appropriated or expected to be appropriated to the Department of Education, the Depart-

[9] This amount is of course subject to modification for subsequent school years if a factual showing indicates a different amount is called for.

ment of Justice or any other agency, which funds may be provided to Board pursuant to Section 15.1 without further Congressional action (in particular, but not to the exclusion of other federal funding sources, this Court has found such funds may be available in the Salaries and Expenses subaccount, the Office for Civil Rights account and the Gift and Bequest account);

(b) identify all "excess funds,"[10] in the Department of Education or any other agency, which funds could be reappropriated through Congressional action to be provided to Board;

(c) identify all pending legislative initiatives that would make desegregation funding available for provision to Board;

(d) identify new legislative initiatives that could be undertaken by United States to provide desegregation assistance to Board (this includes, without limitation, legislation comparable to Section 111 of P.L. 98-107);

(e) recommend to the Congress, and otherwise make every good faith effort to secure the enactment of, all legislation necessary to accomplish the United States' program to find and provide funds for implementation of the Plan in school year 1985-86 and subsequent school years;

(f) oppose any proposed legislation that is specifically designed to decrease the amount of funds that could be provided to Board in school year 1985-86 and subsequent school years;

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[10] "Excess funds" include any funds now or subsequently appropriated to an agency for budget accounts that do not include desegregation assistance, which the agency will not expend for the purpose for which they were appropriated, whether or not the agency has determined that it will seek to rescind, allow to lapse or seek to reallocate the funds to other budget accounts. For example, while the Executive Branch is to carry out this step promptly without waiting for the end of the fiscal year, the Executive Branch shall report to the Court on September 15, 1984, identifying any funds that may lapse in any agency account at the end of fiscal year 1984. That same information shall be reported to this Court on September 15 of each succeeding federal fiscal year.

(g) cooperate with Board to satisfy any administrative requirements and remove any administrative obstacles that might impair providing desegregation funding to Board to the fullest extent consistent with applicable statutes;

(h) identify any steps within the lawful authority of the Department of Education that would encourage the State of Illinois to use for desegregation assistance to the Board its discretionary share of funds provided under Chapter 2 of the Education Consolidation and Improvement Act of 1981 ("ECIA"); and

(i) to the extent funds are or could be made available to the Board for implementation of the Plan in school year 1985-86 and for subsequent school years, provide by November 1 preceding each of those school years, up to $103.858 million[11] into an escrow account established by this Court for the use of Board.[12]

On or before November 15 of each year preceding the next upcoming school year, United States shall file a report with this Court describing in detail the United States' program to find and provide federal funding for implementation of the Plan in that upcoming school year and the steps taken by the United States to effectuate that program.

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[11] As previously indicated, this amount is subject to possible future modifications.

[12] Specific terms of the escrow account shall be determined by this Court at the previously set status hearing to be held on September 7, 1984. This Court requests that the parties submit proposals concerning the procedures governing and the terms for this escrow prior to that date. It is intended, and the escrow terms shall specifically provide, that upon determination by this Court that all or some portion of the escrowed funds are necessary to implement the Plan in the upcoming school year, the Secretary of Education shall provide the escrowed funds to Board for that purpose. Until such determination is made, the Secretary shall hold the funds in escrow. Any unused funds shall not lapse and shall continue in the escrow for use by Board in the next succeeding school year for implementation of the Plan, and the amount of the United States' contribution for the next succeeding school year shall be reduced accordingly.

16. In all events the United States' program referred to in Paragraph 15 shall include, without limitation, the actions described in Paragraph 17.[13]

17. Fiscal year 1983 funds in the amount of $21,188,206, appropriated by Congress to the Department of Education for various non-desegregation purposes, were not obligated or expended at the close of fiscal year 1983, and would have lapsed back to the United States Treasury but for this Court's Order of September 27, 1983. Pursuant to the September 27 Order, lapse of the funds was suspended until further order of this Court. At this time the Executive Branch is directed to take the following actions with respect to such funds:

(a) notify the Congress of the United States that $21,188,206 of fiscal year 1983 non-desegregation assistance funds were unobligated at the close of the fiscal year and would have lapsed but for this Court's Order of September 27, 1983, and that such funds are without competing claimants and may be reappropriated for use in the implementation of the Plan in fiscal year 1985-86;[14]

(b) recommend to the Congress, and otherwise make every good faith effort to secure the enactment of, legislation reappropriating the funds described in Paragraph 17(a); and

(c) if the legislation described in Paragraph 17(b) becomes law, promptly obligate and provide such funds to the escrow described in Paragraph 15.

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[13] In part the further relief requested by Board, referred to in the footnote to Paragraph 6, includes placing in the escrow account the restrained funds appropriated to the Department of Education's Special Programs and Populations Account, other than those referred to in Paragraph 14. This requested relief is also to be addressed in the memoranda to be submitted by the parties, and will be addressed by this Court promptly thereafter.

[14] Contemporaneously with such notification a copy shall be provided to this Court and to counsel for the Board.

18. To ensure that the impact of the United States' actions and this Order is not diluted by other action, the desegregation funding provided by the United States to Board shall supplement and not supplant any other financial assistance provided by the United States to Board. Board shall not be disadvantaged by the United States in the administration of any federal programs by reason of the rights and remedies afforded under the Consent Decree and other court orders in this litigation.

19. To facilitate implementation of this Order, the United States is directed to provide notice of this Order and its contents to each of its agents, officers and employees whose conduct may affect United States compliance with its terms, including Attorney General William French Smith and his agents, Secretary of Education Terrel Bell and his agents, and Director of the Office of Management and Budget David Stockmen and his agents.

20. There is no occasion for the stay of any portion of this Order pending any appeal by the United States. Implementation of this Order is of urgent importance to vindicate the rights of the minority students in Board's schools. As indicated in Paragraph 12, a stay would not only prevent further implementation of the necessary desegregation programs, but would result in the dismantling of programs presently in place, severely disrupting implementation of the Plan. By sharp contrast, the United States will not be disadvantaged by compliance with this Order directing the Executive Branch to fulfill the promises voluntarily made in the Consent Decree. Injury to the Board and its students from delaying the implementation of this Order will be severe and irreparable, and far outweighs any corresponding disadvantage to the United States.

21. Given the nature of the relief granted by this remedial order, coupled with Board's identity as a public body, this Court determines the unlikelihood of damages being sustained by any party who might be wrongfully enjoined or restrained justifies the issuance of this Remedial Order without Board's providing security.

22. This Court sets a hearing for September 7, 1984, at 1:30 p.m. to consider the United States' compliance with this Remedial Order, and to consider the possible additional relief.

567 F.Supp. 272/(1983)

UNITED STATES of AMERICA, Plaintiff,

v.

BOARD OF EDUCATION of the CITY OF CHICAGO, Defendant.

No. 80 C 5124.

United States District Court, N.D. Illinois, E.D.

June 30, 1983.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SHADUR, District Judge.

This Court has conducted hearings on June 1, 7, 8, 22 and 27, 1983 on a petition filed by the Board of Education of the City of Chicago ("Board"). It has considered the testimony and exhibits submitted at those hearings, designations from the deposition testimony of Monika Edwards Harrison and Jack Simms, affidavits of those two deponents and of Carol Cichowski and J. Maxey Bacchus ("Bacchus"), stipulations of the parties and the United States' answers to the Board's First and Second Set of Interrogatories and First Request To Admit.

Findings of Fact ("Findings")

Based on all the evidence this Court determines pursuant to Fed.R.Civ.P. ("Rule") 52(a) that each of the following Findings is supported by a preponderance of all the evidence now before it:[46]

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[46] Each party has stipulated to the authenticity and genuineness of the other party's documentary exhibits and that copies may be used in lieu of originals. There has been no stipulation as to admissibility. Brackets in each Finding indicate the evidentiary source of the

(footnote continued on following page)

1. This is a proceeding to enforce compliance with a Consent Decree between the United States of America and Board, the terms of which were embodied in this Court's September 24, 1980 Order. Specifically, it is to determine the nature and extent of the United States' obligations undertaken by the inclusion of Consent Decree I § 15.1 ("Section 15.1," App. A).

2. Since September 24, 1980 Board has made good faith efforts to implement fully the Comprehensive Student Assignment Plan and the Educational Components of the Chicago desegregation plan (collectively "the Plan"). [Stip.]

3. Since September 24, 1980 Board has made every good faith effort to find and provide every available form of financial resources adequate to pay the cost of full implementation of the Plan. [Bacchus Testimony]

4. Since September 24, 1980 Board has expended approximately $120 million in its efforts to implement fully the various elements and components of the Plan. [Stip.]

5. In School year 1982-83[47] Board has expended or will expend approximately $57.9 million to implement the Plan. [Stip.]

6. For school year 1983-84 Board has budgeted $66.9 million for implementation of the Plan. [Stip.]

7. Board presently projects a budget deficit of approximately $200 million for its 1983-84 fiscal year. [Stip.]

(footnote continued from previous page)

Finding. "Stip." refers to the agreements contained in the Joint Statement of the Parties Concerning Proposed Findings of Fact, rather than indicating the underlying evidence. Some of the "Stip." Findings are agreed to, while others are simply not disputed by the United States. Some are claimed by the United States to be irrelevant, though undisputed.

[47] Board's "school year" is its fiscal year beginning September 1 and ending the following August 31.

8. During school year 1980-81, specifically on September 28, 1980, Board received a Title IV planning grant in the amount of $22,800. [Stip.]

9. During school year 1980-81, specifically on June 15, 1981, Board received a Title IV grant in the amount of $298,639. [Stip.]

10. During school year 1981-82, specifically on September 22, 1981, Board received an out-of-cycle Emergency School Aid Act ("ESAA") grant in the amount of $1,813,025, in response to an application that requested $23,138,977. All the reasons for the difference in funding are not before this Court. [Stip.]

11. All the amounts of funding referred to in Findings 8-10 were received directly from the United States through the Department of Education or its predecessor agency, the Office of Education of the Department of Health, Education and Welfare, and were available to Board for implementation of the Plan. [Stip.]

12. During school year 1982-83 Board received a block grant pursuant to the Educational Consolidation and Improvement Act of 1981 ("ECIA") in the amount of $5.385 million, of which $1.8 million was allocated by Board for implementation of the Plan. Board used the remainder of the block grant to fund other educational programming allowable under ECIA, which would not have been funded absent the allocation of block grant money. [Bacchus Testimony]

13. Board received approximately $674,432 of desegregation-related assistance under Title VII for school year 1981-82 and approximately $528,267 for school year 1982-83. [Stip.]

14. Beginning in federal fiscal year 1981,[48] and for federal fiscal years 1982 and 1983, it has been a priority and a policy

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[48] Federal fiscal years begin October 31 and end the following September 30. Thus "fiscal year 1981" is the year ended September 30, 1981.

objective of the Executive Branch of the United States and the Department of Education to dismantle the Department of Education and turn most of its functions over to state educational agencies. [Stip.]

15. Since federal fiscal year 1981 it has been the policy of the Department of Education not to provide desegregation assistance to local educational agencies through direct grants to local educational agencies of funds appropriated by Congress under Title IV of the Civil Rights Act of 1964 ("Title IV"). [Harrison Dep. 35-36; Simms Dep. 11-14; Bd. Exh. 16]

16. After federal fiscal year 1981 the Executive Branch of the United States and the Department of Education sought repeal of all categorical programs under which the United States could provide direct grants to local educational agencies for desegregation assistance and replacement of those programs, along with all categorical programs under which the United States provided other assistance to local educational agencies, with a block grant of federal funds. Such block grants are allocated to local educational agencies by the states and can be used for the various purposes set forth in ECIA, including the purposes of the former ESAA programs. Title IV remains as a categorical program, as is more fully explained in other Findings. [Stip.]

17. Since federal fiscal year 1981 it has been the policy of the Department of Education and the Executive Branch of the United States to reduce the total amount of funds provided by the United States to the states for the various purposes set forth in ECIA. [Request To Admit Nos. 25, 26.]

18. Since federal fiscal year 1981 it has been the policy of the Department of Education and the Executive Branch of the United States not to seek any legislation or appropriation other than through ECIA that would provide direct financial assistance for desegregation to local educational agencies implementing desegregation plans, and specifically to Board. [Harrison Dep. 105-06; Bd. Exh. 16]

19. All the United States' policy decisions not to provide direct grants to local educational agencies pursuant to Title IV, to provide funding to the states only through block grants, to reduce federal funding to the states for any of the purposes listed in the block grant legislation, and not to seek legislation or appropriations that would directly provide financial desegregation assistance to Board, were determined by the general priority and objective of dismantling the Department of Education and turning most of its functions over to state governmental agencies. [Stip.]

20. Since fiscal year 1981 it has been the policy of the Department of Education to use funds in the Secretary's Discretionary Fund only for the programs required by 20 U.S.C. § 3851(b) or to support projects for research, demonstrations, training, dissemination or other activities that address some national education emphasis, as determined by the Secretary, not including the funding of specific desegregation plans. [Harrison Dep. 124; Request To Admit 27; Bd. Ex. 25]

21. In fiscal year 1981 and in each of the succeeding fiscal years it was, and still is, the position of the Department of Education that it could not and would not approve state educational agency criteria for allocation of block grant funds that were based in part on the amounts local agencies within the state received or could have received under ESAA because such criteria would not adequately reflect "a higher than average cost per child." [Harrison Dep. 133-35; Harrison Dep. Exh. 26, 27]

22. In its development of the policies and in taking its actions described in Findings 14-21, the United States did not give any consideration to its obligations under the Consent Decree in general and under Section 15.1 in particular. [Harrison Dep. 41]

23. Before October 1, 1982 ESAA was the primary means for the United States to provide direct desegregation assistance to local educational agencies. [Stip.]

24. In furtherance of the policies and priorities described in Findings 14-21, the Executive Branch of the United States and the Department of Education have:

(a) requested a significant reduction in ESAA funding from Congress for fiscal 1981; [Stip.]

(b) requested no ESAA funding from Congress for fiscal 1982; [Request To Admit 11]

(c) sought and supported in Congress the repeal of ESAA, which became effective October 1, 1982; [Request To Admit 6]

(d) supported the passage by Congress of the ECIA block grant legislation (as described in Finding 15), which became effective October 1, 1981; [Stip.]

(e) requested from Congress for fiscal 1982 an appropriation of ECIA block grant funding in the amount of $487,525,000, which was (1) $103,843,000 less than Congress had authorized and (2) $50,852,828 less than the amount appropriated by Congress in fiscal 1981 for the categorical grant programs, including ESAA, which the ECIA block grant funding was intended to replace; [Request To Admit 25]

(f) requested from Congress for fiscal 1983 an appropriation of ECIA block grant funding in the amount of $406,080,000, which was (1) $183,288,000 less than Congress had authorized and (2) $130,297,828 less than the amount appropriated by Congress in fiscal 1981 for the categorical programs, including ESAA, which ECIA block grant funding was intended to replace; [Request To Admit 26]

(g) continued a similar request policy for fiscal 1984; [Stip.]

(h) done nothing to ensure that, in fiscal 1982 and 1983, any portion of the ECIA block grant for Illinois was used to support a purpose related to school desegregation; [Harrison Dep. 120]

(i) opposed congressional efforts to reenact ESAA, [Stip.]

(j) failed to request from Congress in fiscal 1982 and 1983 an appropriation to fund any desegregation programs

contemplated by Title IV; [Harrison Dep. 34; Request To Admit 13, 16]

(k) in each of fiscal 1982 and 1983 requested Congress to rescind the $24,000,000 of Title IV funding Congress had previously appropriated; [Harrison Dep. 48]

(l) in fiscal 1983 requested Congress to rescind $2.54 million appropriated to the Secretary of Education's Discretionary Fund; [Stip.]

(m) requested Congress to rescind $41,600,000 appropriated to the Department of Education for special programs and populations, other than Title IV programs, in fiscal 1982 and to rescind at least $28,000,000 appropriated for such programs in fiscal 1983; [Stip.]

(n) determined as a matter of policy to provide no Title IV funding in fiscal 1982 and 1983 to local educational agencies; [Harrison Dep. 26, 35-36; Request To Admit 15]

(o) requested Congress to rescind approximately $900 million in unexpended student loan funding; [Bd. Ex. 28 at 61]

(p) failed to use any portion of the Secretary of Education's Discretionary Fund in fiscal 1982 and 1983 for a direct grant of desegregation assistance to any local educational agency; [Request To Admit 31]

(q) failed to urge state educational agencies to adopt criteria for determining the allocation of block grant funds to "high cost children" that include giving particular consideration or weight to a local educational agency implementing a desegregation plan. [Request To Admit 22, 23]

25. Terrel H. Bell has been Secretary of Education since January 21, 1981. He is responsible for the formulation of the policies and priorities set forth in Findings 14-21 and for the actions taken by the Department of Education to implement those policies and priorities. Since January 21, 1981 he has also been responsible for ensuring that the Department of Education fulfills all its obligations under the Consent Decree, including specifically the obligations imposed by Section 15.1 [Harrison Dep. 12, 32-34, 107, 114.]

26. Monika Edwards Harrison is Director, Policy Planning and Executive Operations, Office of Elementary and Secondary Education, Department of Education. Her immediate superior is Laurence Davenport, Assistant Secretary for Elementary and Secondary Education. Mr. Davenport reports directly to Mr. Bell, the Secretary of Education. [Stip.]

27. Ms. Harrison was responsible for making the policy recommendation to Mr. Bell, through her superior Mr. Davenport, that Title IV funds in fiscal 1982 and 1983 not be used to provide the desegregation assistance contemplated by the purposes of Title IV to local educational agencies, including Chicago. Mr. Bell accepted this recommendation and made it a policy decision of the Department of Education. [Stip.]

28. Ms. Harrison was responsible for making the policy recommendation to Mr. Bell, through her superior Mr. Davenport, that the Department of Education seek to rescind in Congress the Title IV funds appropriated by Congress for use in fiscal 1982. [Harrison Dep. 48]

29. Title IV funds appropriated by Congress for use in fiscal 1982 and 1983 were distributed as direct grants to state educational agencies and desegregation assistance centers. In fiscal 1982 the Illinois Department of Education received a Title IV grant in the amount of $705,832. Desegregation assistance centers that could provide technical and in-service training desegregation assistance to Board are located only at Indiana University, in Bloomington, Indiana and the University of Wisconsin branch in Milwaukee, Wisconsin. Only the center at Indiana University is a race-specific desegregation assistance center. In fiscal 1982 the Title IV grant to the Indiana University center was $311,629. In fiscal 1982 the Title IV grant to the University of Wisconsin-Milwaukee center was $385,560. [Stip.]

30. In fiscal 1982 and 1983 the Department of Education took no actions to ensure that Board received the desegregation

assistance contemplated by Title IV from the Illinois Department of Education and the desegregation assistance centers described in Finding 29. [Harrison Dep. 45-47, 147, 154; Simms Dep. 36, 38]

31. In fiscal 1982 the Department of Education made Title IV grants to 42 state educational agencies. There are 49 such applicants for 1983. In fiscal 1982 the Department of Education made Title IV grants to 25 desegregation assistance centers, and it plans to make similar grants in fiscal 1983. [Response To Int. 16, 17]

32. Use of the Title IV appropriations in fiscal 1982 and 1983 to fund state educational agencies and desegregation assistance centers by definition reduced the level of technical and in-service training assistance available to Board from the levels of such assistance available to it under Title IV in prior fiscal years.

33. In fiscal 1982 and 1983 Department of Education took no actions toward providing a grant of Title IV funds to Board to assist its implementation of the Plan. [Harrison Dep. 26, 35-36]

34. In fiscal 1982 the Secretary of Education or his delegee had the authority to provide a grant of Title IV funds to Board to assist its implementation of the Plan, and it is still within the Secretary's discretion to do so. [Harrison Dep. 70-71]

35. Of the Title IV funds appropriated to the Department of Education by Congress in fiscal 1982, $24,000,000 remains unobligated at this time. [Stip.]

36. No state educational agency ("SEA") will cease operation solely because it failed to receive a grant of Title IV funding in fiscal 1983. [Harrison Dep. 147-48] No SEA program will cease to exist solely because that program failed to receive Title IV funding in fiscal 1983. [Simms Dep. 24-25; Harrison Dep. 147-48] No desegregation assistance center

("DAC") will cease operation solely because it failed to receive a grant of Title IV funding in fiscal 1983. [Stip.]

37. Some largely administrative inconvenience may result for DAC and SEA projects currently receiving Title IV funding from delaying any obligation of such funding beyond August 15, 1983. There is no evidence those projects would suffer substantial harm from the delay in further obligation of funding. There is also no evidence most of those projects could not continue even without receiving the funding after August 15. Nothing in the record shows those projects would not receive funding from other sources or receive continued support from the state agencies and universities with which nearly all of them are affiliated.

38. Delay in obligating Title IV funding for new DAC and SEA projects similarly will result in some largely administrative inconvenience, which cannot be considered substantial harm. Delay until August 1 in obligating monies from the Discretionary Fund will create some administrative inconvenience and minor detrimental effects on planning, but will also not cause substantial harm.

39. Both the Secretary of Education and the Department of Education recognize that the implementation of a desegregation plan can impose a higher educational cost per child on the school district that is implementing the Plan. [Request To Admit 22]

40. For fiscal 1982 $28,224,000 was allocated to the Secretary of Education's Discretionary Fund. In fiscal 1982 the Department of Education took no actions toward providing a grant from the Secretary's Discretionary Fund to Board to assist its implementation of the Plan. [Request To Admit 28, 31]

41. For fiscal 1983 $28,765,000 was allocated to the Secretary of Education's Discretionary Fund. In fiscal 1983 the Department of Education has taken no actions toward provid-

ing a grant from the Secretary's Discretionary Fund to Board to assist its implementation of the Plan. [Request To Admit 29, 31]

42. Of the amounts appropriated in fiscal 1982 and 1983 for the Secretary's Descretionary Fund, $10,725,000 had to be used each fiscal year to support certain programs mandated by Congress. In fiscal 1982 the Secretary of Education or his delegee had the authority to grant all or part of the remaining unencumbered funds in the Secretary's Discretionary Fund to Board to assist its implementation of the Plan. Similarly, the Secretary of Education or his delegee had and has the authority to grant all or part of the unencumbered funds currently in the Secretary's Discretionary Fund to Board to assist its implementation of the Plan. [Request To Admit 27, 30; 20 U.S.C. § 3851]

43. There is $8,980,470 in the Secretary's Discretionary Fund for fiscal 1983 which remains unobligated at this time, without considering the three programs mandated by ECIA § 583(b). [Stip.]

44. Except as stated in Finding 48, the Executive Branch of the United States and the Department of Education have taken no action either to initiate legislation or to support pending legislation that would result in Board receiving direct financial assistance from the United States for implementation of the Plan. [Harrison Dep. 105-06]

45. Neither the Executive Branch of the United States generally nor the Department of Education specifically has taken any action toward reprogramming funds in a manner that would result in Board receiving direct financial assistance from the United States for implementation of the Plan. [Harrison Dep. 140]

46. Except as stated in Finding 48, the Executive Branch of the United States and the Department of Education have taken no action to seek congressional approval for reappro-

priating some portion of the excess student loan funds in a manner that would result in Board receiving direct financial assistance from the United States for implementation of the Plan. [Harrison Dep. 139-40, 143]

47. Board, through its counsel and its Superintendent of Schools Dr. Ruth B. Love, has repeatedly asked the Executive Branch of the United States and the Department of Education for direct financial assistance to enable Board to implement fully the Plan. Among these requests were the following:

(a) a June 2, 1982 letter to William Bradford Reynolds from Robert C. Howard, one of Board's attorneys; [Bd. Ex. 3]

(b) a July 12, 1982 letter to Mr. Reynolds from C. Richard Johnson and Mr. Howard, two of Board's attorneys, enclosing the outline for a "Federal Government Financial Plan for the Chicago Desegregation Plan"; [Bd. Exs. 4,5]

(c) an August 3, 1982 letter to Alexander Ross of the Department of Justice from Hugh R. McCombs, Jr., one of Board's attorneys; [Bd. Ex. 7]

(d) an August 10, 1982 letter to Mr. Ross from Mr. Howard; [Bd. Ex. 8]

(e) a February 16, 1983 letter to Secretary of Education Terrel H. Bell from Dr. Love; [Bd. Ex. 17]

(f) a February 17, 1983 letter to Mr. Bell from Dr. Love; [Bd. Ex. 18]

(g) a May 13, 1983 letter to Mr. Bell from Messrs. Howard and Johnson; [Bd. Ex. 20] and

(h) a May 25, 1983 letter to Mr. Bell from Messrs. Howard and Johnson. [Bd. Ex. 19]

[Stip.]

48. Since entry of the Consent Decree the Executive Branch of the United States and the Department of Education have taken only the following actions (in addition to those

referred to in Findings 8-10) to fulfill the obligations of the United States under Section 15.1.[49]

(a) Since early 1982 the Department of Justice has made telephone inquiries of Monika Harrison at the Department of Education to determine the amount of funding that could be made available to Board through the Office of Elementary and Secondary Education to assist Board's efforts fully to implement the Plan. [Stip.]

(b) In August 1982 Mr. Reynolds, head of the Civil Rights Division of the Department of Justice, met with Board members, Dr. Love, staff and Board counsel in Chicago to discuss the United States' efforts to provide funding to assist Board's efforts fully to implement the Plan. Mr. Reynolds told Board the United States would make no decision on funding until after this Court had decided the Plan was constitutional. [Stip.]

(c) Before August 1982 Ms. Harrison had taken actions, both personally and through her subordinates and colleagues at the Department of Justice, to identify funding that could be made available to Board through the Office of Elementary and Secondary Education to assist Board's efforts fully to implement the Plan. Those actions involved reading applicable statutes and regulations and budget documents. Before August 1982 Ms. Harrison concluded no such funding could be made available to Board, and her conclusion was communicated to the Department of Justice. Since then she has stated that conclusion to the Department of Justice in response to all inquiries concerning available desegregation funds for Board. [Harrison Dep. 26-27, 29-30]

(d) On September 14, 1982 Mr. Reynolds wrote the Secretary of Education asking him to identify any available sources of desegregation funding for the Plan. [Bd. Ex. 12]

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[49] "Stip." in the subparagraphs of this Finding 48 reflect the parties' agreement the specified actions were taken. It is the United States' position that other actions have been taken by it as well. Because this Court's ultimate Findings and Conclusions are not dependent on the specifics in that respect (given the United States' affirmative steps to disable itself from fulfilling its obligations, see Conclusion 4), the disputed areas are irrelevant to this order.

(e) On November 15, 1982 the Secretary of Education replied in writing to Mr. Reynolds' letter. He stated the Department of Education could provide no direct desegregation funding to Board and such funding could be made available to Board through the ECIA block grant to the State of Illinois. [Bd. Ex. 16]

(f) On February 14, 1983 the Secretary of Education met in Washington with Board members, Dr. Love and Board counsel. During that conference Board asked Secretary Bell to seek direct federal funding to assist Board's efforts fully to implement the Plan. Despite that request the Executive Branch sought no legislative initiative. [Bd. Ex. 17]

(g) On May 20, 1983 the Undersecretary of Education circulated a memorandum to the Assistant Secretaries of Education requesting them to examine ways to provide direct desegregation funding to Board. Attached to the memorandum was a copy of the Consent Decree. Before May 20, 1983 the Consent Decree had not been circulated within the Department of Education at either the Assistant Secretary or Director level. To date the Plan has not been circulated to or read by anyone within the Department of Education. [Harrison Dep. 16-17, 111-12; Simms Dep. 29-33]

49. For fiscal year 1983 Congress appropriated funds for a number of programs as to which the Executive Branch of the United States and the Department of Education have requested congressional rescission of the appropriated funds: $5.76 million for Women's Educational Equity, $19.440 million for Follow-Through, $960,000 for Territorial Training and $1.92 million for Aid to the Virgin Islands. Congress has not enacted the proposed rescission for the Special Programs and Populations account. Substantially all those funds remain unobligated as of June 27, 1983. [Stip.] By the end of fiscal year 1984 the Department plans to obligate all those funds. [Harrison Dep.]

50. In the March 30, 1983 Federal Register (48 F.R. 13220) the Department of Education published a notice:

(a) inviting applications for grants under the Secretary's Discretionary Program;

(b) announcing priorities in three areas: (1) expanding parental choice in education, (2) improving teacher quality through incentives and (3) strengthening local school boards;

(c) stating if funds are left after awards are made for those priorities, the Secretary would consider funding unsolicited grant applications; and

(d) requiring the grant applications to be mailed or hand-delivered on or before August 1, 1983. Chicago has not yet submitted an application under the program. [Cichowski Aff. ¶.3; 48 F.R. 13220] At present Board is engaged in the process of completing an application it intends to submit to the Department of Education.

51. Harrison Aff. ¶¶ 5 and 6 state:

5. Chicago received $3,449,658 for FY 1980 under the antecedent programs included in Chapter 2;/$6,784,273 for FY 1981 under these programs; and $6,258,257 for FY 1982 under Chapter 2.

6. In FY 1982, Chicago received 30% of the Chapter 2 funds received by the State of Illinois. In FY 1981, Chicago received 30% of the funds received by all grant recipients in Illinois under the antecedent programs of Chapter 2. In FY 1980, Chicago received 11% of the funds received by all grant recipients in Illinois under the antecedent programs.

In fiscal years 1980 through 1982 limited portions of the funds received by Chicago under those programs were expended pursuant to statute for children in private schools. [Stip.]

52. Information provided in the June 24, 1983 Affidavit of Jack A. Simms ¶¶ 10, 11 and 12 was provided to Board for the first time on June 22 and June 24, 1983. Board has not had an opportunity to examine the records or depose the personnel of the federal grantees involved.

53. Based on all the foregoing Findings, this Court finds the United States has failed to use its best efforts to find and provide all available financial resources adequate for full implementation of the Plan. On the contrary, since January 21, 1981 the Executive Branch of the United States and the Depart-

ment of Education have been engaged in a continuous effort to strip away all means by which they could fulfill the United States' obligations under Section 15.1.

54. For each school year since 1981-82 Board has made or has budgeted "specific desegregation expenditures" for the purpose of Plan implementation. "Specific desegregation expenditures" are those expenditures made by Board to implement programs specifically resulting from adoption of the Plan, such as magnet schools, voluntary transfer programs and compensatory educational remedies at racially isolated schools. In addition to specific desegregation expenditures, Board has made other expenditures that would have occurred absent the Plan, but that are significantly impacted and directed by the implementation of the Plan. Those include, for example, expenditures devoted to reassessment and placement of special education students pursuant to the Educational Components of the Plan. [Stip.]

55. For school year 1981-82 Board expended approximately $38.8 million for specific desegregation expenditures. In addition Board incurred expenditures for reassessment and placement of special education students totalling approximately $4 million pursuant to the provisions of the Plan. [Stip.]

56. For school year 1982-83 Board will expend approximately $56.9 million in specific desegregation expenditures. In addition to those specific desegregation expenditures, Board devoted approximately $4.2 million to the reassessment and placement of special education students pursuant to the provisions of the Plan. [Stip.]

57. For school year 1983-84 Board has budgeted approximately $66.9 million for specific desegregation expenditures. It projects an operating budget deficit of approximately $200 million for that year, including the budgeted level of specific desegregation expenditures. With the exception of an increase of $10 million for specific desegregation expenditures, the $200

million budget deficit is based on an assumption that services and programs will be maintained at their 1982-83 level. It does not assume any expansion of programs or services or general increases in compensation for Board employees. [Stip.]

58. Any amounts over and above the $66.9 million budgeted for school year 1983-84 that are devoted by the Board to Plan implementation and are not provided from funding sources external to the Board will increase the Board's presently projected $200 million deficit. [Stip.]

59. Board needs approximately $163 million over 5 years to rehabilitate the facilities of schools that are racially isolated minority schools. Board's projected expenditures for school year 1983-84 do not include an expenditure for the rehabilitation of any facilities. [Bacchus Testimony]

60. Board does not now have financial resources adequate fully to implement the Plan in school year 1983-84 and does not expect to obtain such funds from the external and internal sources of revenue projected to be available to it in that fiscal year. [Bacchus Testimony]

Conclusions of Law ("Conclusions")

Based on the foregoing Findings, this Court has made and hereby states the following Conclusions in accordance with Rule 52(a):

1. On September 24, 1980 this Court properly approved and entered a Consent Decree between the United States and Board. That Consent Decree was properly executed by the Attorney General, who has plenary power to conduct and supervise all government litigation. *ICC v. Southern Railway Co.*, 543 F.2d 534, 535 (5th Cir. 1976). It is an "order granting an injunction" within the meaning of Rule 65(d), *ILA, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75, 88 S.Ct. 201, 207, 19 L.Ed.2d 236 (1967), and is binding on the

United States and all its officers, agents, servants, employees and attorneys.

2. Consent decrees are binding orders that have the same force as any other judgment. Accordingly the Consent Decree is fully enforceable by this Court. *United States v. City of Miami, Florida,* 664 F.2d 435, 440 (5th Cir. 1981).

3. Consent decrees also have many of the attributes of contracts and are construed according to contract principles. Accordingly the scope of a consent decree will be discerned from its four corners, *United States v. Armour & Co.,* 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971), although interpretive aids consistent with contract law may be used if necessary. *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 236, 95 S.Ct. 926, 934, 43 L.Ed.2d 148 (1975).

4. Section 15.1 is unambiguous in its terms. It clearly expressed and continues to express the mutual intent of the parties, and does not require extrinsic evidence to be construed. Even if it were to be viewed otherwise, and if resort were had to other parol evidence materials submitted by the United States in reliance on *White v. Roughton,* 689 F.2d 118 (7th Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 1524, 75 L.Ed.2d 947 (1983),[50] these Conclusions would be the same. In essence the United States seeks to parse Section 15.1 in an impermissible way, arguing the word "available" is a term of limitation that circumscribes what it must do to find and provide "financial resources"—money—adequate to implement the Plan. "Available" might alternatively be viewed as simply a term of

[50] *White* involved a situation very different from the present one. There the literal terms of the consent decree were at war with common sense, and the court considered the parties could not have intended its literal meaning. That is not at all the case here, and this Court need not explore the possible implications of *White* in other circumstances.

emphasis (it is directly coupled with "every")[51] or as tautological (after all, by definition "unavailable" financial resources could not be provided). But the shades of meaning need not be resolved in the circumstances of this case. What the United States glosses over is that it could not in good faith, having entered into the Consent Decree, work actively to make financial resources unavailable. That would permit a contracting party deliberately and by its own unilateral action to flout its own contractual undertaking and its obligations to this Court as well as to Board. Yet that is precisely what the United States has done—and it acknowledges having done so, for it has stipulated to most of the Findings to that effect. For that reason it is entirely proper to require the United States to take all affirmative steps available to it *to seek to make available* financial resources adequate for implementation of the Plan. And that is so whether or not, absent its prior conduct to

[51] Indeed one of the United States' tendered documents as part of its Group Ex. 1 makes that point graphically. In the June 19, 1980 letter from Assistant Attorney General Drew Days III of the Civil Rights Division to Board attorney Frank Cicero (one of the steps in the negotiations that led to the Consent Decree), Days asked whether Board would be willing to include the following provision among others in a consent order (emphasis added):

> A statement that while each party is obligated to search for every available means to provide adequate financial resources for the implementation of the desegregation plan and while each party reserves the right to seek to add additional parties who may be legally obligated to contribute to the cost of desegregation, the parties recognize that financial cost of implementation is not a legally sufficient basis for postponement, cancellation or curtailment of the desegregation plan....

That emphasized language was obviously the antecedent of Section 15.1, except that "search for" became "find and provide"—a broader obligation on the United States. Simply to read the emphasized clause compels recognition of the fact its stress was on a universal search—on "every"—and it is artificial to detach "available" from the rest of the clause as a limiting term.

frustrate the Consent Decree and its obligations under Section 15.1, that would have been the required reading of that Section.[52]

5. All terms of the Consent Decree, including Section 15.1, are entitled to particular respect because they embody the conditions upon which Board waived its right to litigate, a right guaranteed by the Due Process Clause of the Fourteenth Amendment. *Armour & Co.*, 402 U.S. at 682, 91 S.Ct. at 1757.

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[52] Government Ex. 2 is a joint stipulation as to negotiations leading to the Consent Decree, an exhibit Board seeks to exclude from consideration. It states in part:

> At a relatively early stage in the negotiations leading to the Consent Decree, the parties discussed the question of financial support from the United States for the Board's desegregation activities. It was the Government's position that no funding commitment specific as to form and amount could be made in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government funding, or a variety of other matters.... These discussions took place approximately two months before the completion and execution of the Consent Decree. It was concluded that the matter of federal financial support would be handled by including general provisions in the Consent Decree, and Section 15.1 was drafted and incorporated into the Decree. Section 15.1 was not designed to incorporate any specific discussions between the parties on this issue, but to establish a general obligation on the part of both parties which would be interpreted and applied as appropriate in whatever future circumstances might arise.

What the United States obviously fails to perceive is that its own position, and the manner Section 15.1 came into being, barred it from the kind of conduct it has engaged in to frustrate its own commitment. What this Court is in fact doing now is "interpret[ing] and apply[ing]" the "general obligation on the part of [the United States] ... as appropriate in [today's] circumstances...." Again the history it seeks to urge on this Court supports, rather than undermining, this Conclusion.

6. To date Board has fulfilled its obligations under the Consent Decree, particularly including Section 15.1. Despite such fulfillment of its obligations, Board cannot obtain "adequate" financing for full implementation of the Plan without receiving financial assistance from other sources, including the United States.

7. Under the Consent Decree Board is not required to exhaust all its available resources for implementation of the Plan before the United States becomes obligated to find and provide every available form of financial resources adequate for implementation of the Plan.

8. In all events the United States' promise to "make every good faith effort" to find and provide available funds entails a serious and substantial obligation. *Geisser v. United States,* 513 F.2d 862, 869-71 (5th Cir. 1975), *on remand,* 414 F.Supp. 49 (S.D. Fla. 1976), *appeal after remand,* 554 F.2d 698 (5th Cir. 1977), *appeal after remand,* 627 F.2d 745 (5th Cir. 1980), *cert. denied,* 450 U.S. 1031, 101 S.Ct. 1741, 68 L.Ed.2d 226 (1981). Having properly exercised its discretion by entry into the Consent Decree, see *Gautreaux v. Pierce,* 690 F.2d 616, 628-29, 637-38 (7th Cir. 1982) the United States does not have discretion to violate it.

9. Under the plain language of the Consent Decree and under the circumstances described in Conclusion 4, the Executive Branch of the United States is unquestionably now obligated to take every affirmative step within its legal authority to find and provide adequate financing for the Plan. *Brewster v. Dukakis,* 675 F.2d 1 (1st Cir. 1982), *aff'g as modified decisions in* Civil Action No. 76-4423-F (D.Mass. Sept. 15, 1981; Dec. 23, 1981); *Ricci v. Okin,* 537 F.Supp. 817 (D.Mass. 1982). That obligation includes the following efforts and actions, to the extent necessary to assure full implementation of the Plan:

(a) "provide" any presently available funds;

(b) "find" every available form of funds, by identifying excess or otherwise available appropriations for other purposes and

(1) notifying Congress of the intent to reprogram such funds when they are in the same budget account; or

(2) seeking congressional reappropriations of such funds from other budget accounts;

(c) "find" funds by supporting specific legislative initiatives to meet the obligations to Board;

(d) "find" funds by not failing to seek appropriations that could be used for desegregation assistance to Board, and by not attempting to rescind all such appropriations.

10. By taking actions to render financial assistance unavailable for the purposes specified in Section 15.1, the United States has violated its obligations under the Consent Decree. It has failed to make substantial efforts to find and provide financial assistance, and it must now do so. Funds have been available to the United States that would have been provided to Board had the United States employed "every good faith effort" as it was bound to do. Such funds continue to be available at this time.

11. This Court has not had the opportunity in the limited time available for the hearings to verify the validity of all of the following. It appears however that the currently "available forms of financial resources" may include the following:

(a) Under ECIA the Secretary of Education is authorized to reserve up to 6% of the total amounts appropriated under the block grant provisions of ECIA, to carry out various programs, in his discretion. 20 U.S.C. §§ 3813, 3851. Of the $28,765,000 set aside for the Secretary's Discretionary Fund in fiscal year 1983, $10,725,000 must be used to fund the programs mandated by 20 U.S.C. § 3851(b). Other moneys in the Discretionary Fund may be used to provide desegregation assistance directly to local educational agencies. 20 U.S.C. §§ 3832(7), 3811, 3851(a)(2)-(4). Approximately $8,980,000 is currently available in the Discretionary Fund. It is within the

Secretary's authority to establish priorities, and to give a competitive or absolute preference to applications which meet those priorities, for grants from the Discretionary Fund. 34 C.F.R. 75.105(c)(2), 75.105(c)(3). Nothing in the Education Department's General Administrative Regulations (ED/GAR), which govern grants made out of the Secretary's Discretionary Fund, would prevent the Secretary from making an award to Board. 32 C.F.R. 75.210, 75.217. There are no statutory, regulatory or other legal provisions that prevent the Secretary from using the unobligated monies in the Discretionary Fund to provide financial assistance to Board for desegregation.

(b) There are no statutory, regulatory or other legal provisions that would preclude the Secretary of Education from awarding all or part of the $24 million currently available in the Title IV program fund to Board for the purposes set forth in 42 U.S.C. §§ 2000c-2 and 2000c-4. EDGAR provisions do not apply to grant awards under Title IV, which can be made by the Secretary at any time. 34 C.F.R. 270.02(c), (e), 270.74(a).

(c) In addition to the foregoing items, the Secretary of Education may reprogram funds between programs within the same budget account by providing notice to the Chairmen of the two congressional appropriations committees. $28.058 million is currently available in programs other than Title IV, in the Special Projects and Populations account. Those funds could be reprogrammed to the Title IV program and made available to Board for desegregation assistance.

12. Funds distributed to Board pursuant to ECIA's block grant legislation do not fully satisfy the United States' obligations under the Consent Decree. Moreover the Secretary of Education has the authority to issue regulations relating to the approval of block grant distribution criteria submitted by the states and to consult with state and local officials regarding the distribution of block grant funds on his own initiative (20 U.S.C. § 3871(a)). Although the United States cannot itself "provide" the block grant funds, its "good faith effort" obligations under Section 15.1—in light of its past conduct—include the current exercise of its retained authority to encourage

provision of block grant funds in a manner that takes into account Board's need for desegregation assistance.

13. Every citizen has a right to expect fair dealing from the government and must be able to have confidence in the integrity of the nation's officials. *S & E Contractors, Inc. v. United States,* 406 U.S. 1, 10, 92 S.Ct. 1411, 1417, 31 L.Ed.2d 658 (1972); *United States v. 119.67 Acres of Land,* 663 F.2d 1328, 1333-34, 1336 (5th Cir.1981). When government officials are involved, it is particularly important for this Court to insure compliance with its orders. *United States v. An Undetermined Quantity of An Article of Drug Labeled As Benylin Cough Syrup,* 583 F.2d 942, 949 (7th Cir.1978). As a judgment, a consent decree may be enforced by citation for contempt if it is violated. *City of Miami,* 664 F.2d at 440; *United States ex rel. Shell Oil Co. v. Barco Corp.,* 430 F.2d 998, 1000 (8th Cir. 1970).

14. What the government's arguments here seek to do is to modify the Consent Decree, though it denies that intention and charges Board with the same motive. Both parties agree the standard for modification of a consent decree is a strict one, and relief is granted only upon a showing of exceptional circumstances. *Fox v. United States Department of Housing and Urban Development,* 680 F.2d 315, 322 (3d Cir.1982); *Ricci,* 537 F.Supp. at 825 (D.Mass. 1982). That strict standard applies with equal force to cases involving government officials. Id.; *Philadelphia Welfare Rights Organization v. Shapp,* 602 F.2d 1114, 1119-21 (3d Cir.1979) *cert. denied,* 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980) (both involving state officials).

15. There are no circumstances advanced by either party justifying modification of the Consent Decree. Certainly conditions created by a party itself, such as the United States invokes here, are not grounds for modification. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 678 F.2d 470, 476 (3d Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 298, 74 L.Ed.2d 280 (1982); Williston on Contracts § 1959 (3d Ed.1978).

16. To be entitled to preliminary injunctive relief, a plaintiff must show a reasonable likelihood of success on the merits, that irreparable harm will occur if the injunction does not issue, that the threatened injury to plaintiff outweighs the threatened harm to defendant, and that the grant of the injunction will not disserve the public interest. *Wesley-Jessen Division of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 864 (7th Cir.1983). Application of these principles to this case demonstrates Board has borne its burden on each of those criteria:

> (a) There is a substantial likelihood Board will prevail on its Petition. There is substantial evidence the United States has violated its binding and enforceable obligations under the Consent Decree and the disposition of the funds at issue would constitute a further violation.
>
> (b) Board will be irreparably injured if the United States is not restrained from committing or expending further funds, because the Court will be effectively deprived of its power to grant the relief sought.
>
> (c) Any hardship imposed on the United States from the grant of this injunction is not substantial. It certainly does not outweigh the injury to be inflicted upon Board if the injunction is not granted.
>
> (d) Without question the public interest is best served by granting the injunction. In particular, the public interests in assuring full and adequate implementation of the Plan, in preserving the integrity of the Consent Decree and in protecting the dignity and power of this Court would be served.

Accordingly Board continues to satisfy all of the requirements for preliminary injunctive relief.

17. Considerations of comity dictate that the United States be given one final opportunity to comply with its obligations under the Consent Decree and that it receive definitive guidance from this Court. Given that fact and the nature of the relief granted by the Order entered contemporaneously with these Findings and Conclusions, coupled with Board's identity

as a public body, this Court finds the unlikelihood of any damages to be incurred or suffered by any party who might be found to have been wrongfully enjoined or restrained justifies issuance of an injunction without the giving of security by Board.

APPENDIX A

15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

ORDER

This Court has considered the Petition filed by the Board of Education of the City of Chcago ("Board") and its Motion for Declaratory and Injunctive Relief, the full record in this litigation to date, and the hearings held and evidence received on June 1, 7, 8, 22 and 27, 1983. In accordance with and in implementation of the Findings of Fact and Conclusions of Law entered by this Court contemporaneously with this Order,[53] it is hereby ORDERED, ADJUDGED AND DECREED:

1. This Court declares the liability, rights and obligations of the parties as follows:

(a) This Court's September 24, 1980 Consent Decree, and particularly Section 15.1, is a binding and enforceable obligation of the United States, its agencies and officers, both as a settlement agreement among the parties and as an order of this Court.

(b) Under Section 15.1 the Executive Branch of the United States is now required to take every

[53] All terms defined in the Findings and Conclusions shall have the same meaning when used in this Order.

affirmative step within its legal authority to seek to "find and provide" desegregation funding to Board, until funding adequate for full implementation of the Plan has been provided.

(c) More specifically, the obligation of the United States pursuant to Section 15.1 requires that the Executive Branch take the following affirmative steps:

(1) identify all funds that are currently appropriated and can be used to provide desegregation assistance to Board without any further congressional action;

(2) identify all funds that are currently appropriated for purposes other than desegregation assistance to local educational agencies but that are within the same budget account as desegregation assistance funds, so they could be provided to Board by giving notice to Congress that the funds are being reprogrammed, but without any congressional action;

(3) identify all "excess" funds currently appropriated for budget accounts that do not include desegregation assistance in the Department of Education or any other agency that has authority to provide financial desegregation assistance, but that could be reallocated through congressional action to budget accounts allowing desegregation assistance.[54]

(4) identify any available legislative initiatives to the extent that such initiatives would provide financial desegregation assistance specifically to Board;

(5) to the extent funds are or become available, provide financial desegregation assistance to board in an amount that, together with

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[54] "Excess" funds include any allocated funds the agency has determined it will not expend for the purpose for which they were appropriated, but instead will seek to rescind, allow to lapse or seek to reallocate to other budget accounts.

funds provided from Board and other sources, is adequate for full implementation of the Plan.[55]

(6) cooperate with Board so as to fulfill any administrative requirements, and remove any administrative obstacles, that bear upon providing general support for the Plan; and

(7) take any steps available within its lawful authority to promote the use of funds provided to the State of Illinois under ECIA for desegregation assistance to Board.

(d) Funds are currently available in the Discretionary Fund and in the Special Programs and Populations Fund, in amounts exceeding $15 million, that could be provided by the Secretary of Education to Board for desegregation assistance.

(e) Because the United States has failed to provide formerly and presently available desegregation funding to Board, has taken virtually no affirmative steps to find and provide such funding and has indeed taken affirmative steps to minimize and eliminate available sources of such funding, the United States has violated and continues to violate the agreement between the parties and the order of this Court embodied in the Consent Decree.

(f) Under the Consent Decree the obligations of the United States concerning funding extend for a five-year period. Because the United States has not effectively begun to meet its funding obligations before now, that five-year period shall begin with school year 1983-84 rather than when the Plan was first implemented.

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[55] If several sources of funds that are available to draw upon are more than adequate in the aggregate for full implementation, it is within the discretion of the United States to determine which of those sources to draw upon: funds identified under Subparagraph 1(c)(1), or funds obtained through reprogramming, reappropriation or new legislation pursuant to the possibilities identified under Subparagraphs 1(c)(2) through 1(c)(4), or funds obtained from any other possible source.

(g) For purposes of Section 15.1 and of Subparagraph 1(c)(5) of this Order, the amount of funding adequate for full implementation of the Plan on an annual basis includes the following:

(1) $56.9 million in incremental desegregation expenditures budgeted by Board for school year 1982-83;

(2) $14.6 million, which is the amount of additional incremental expenditures required by Board to achieve the necessary threshold level of funding for Educational Components in predominantly minority schools, as identified by Board in Part II of the Plan (filed April 29, 1981);[56] and

(3) such additional amounts as may hereafter be determined by this Court, pursuant to Board's contentions described in Subparagraph 1(h) of this Order.[57]

(h) Board contends the following additional amounts are necessary for adequate full implementation of the Plan:

(1) expenditures for ongoing Board resources that have been wholly or substantially devoted to, or redirected for the purpose of, implementing the Plan (such as in the reassessment of all EMH students in the school system);[58]

(2) approximately $163 million over the next five to seven years for improving the physical conditions in predominantly minority schools to ensure a safe, clean and attractive environment in all such schools;

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[56] This amount includes the $10 million in additional incremental desegregation expenditures budgeted by the Board for school year 1983-84.

[57] This provision does not constitute a determination as to the validity or invalidity of those contentions, a subject that remains for future determination by this Court.

[58] Expenditures devoted to the EMH aspect of such desegregation implementation was $4.6 million in school year 1982-83 and will be the same amount in 1983-84.

(3) amounts necessary to implement new desegregation measures adopted in Board's 1983 Annual Desegregation Review, including two new magnet schools, certain magnet and specialty programs, and measures to relieve over-capacity enrollments in predominantly minority schools; and

(4) amounts necessary for educational remedies in predominantly minority schools and integrated/desegregated schools, such as staff development at all levels, implementation of the Effective Schools Program, a summer school program for students achieving substantially below grade level and other programs.

(i) Both the Plan and the further evidence presented to this Court indicate Board is making every good faith effort to find and provide funding adequate for full implementation of the Plan. Nonetheless Board does not have resources adequate for the full implementation of the Plan, and in particular does not have the $14.6 million described in Subparagraph 1(g)(2).

(j) This Court recognizes the costs of the Plan must be borne by Board and the United States (and potentially third parties) in amounts or proportions yet to be finally determined. That determination will depend upon various factors, including the total funding adequate for full implementation of the Plan and the resources that can be provided by Board, the United States and other parties. At this time the amount to be borne by the United States is, at a minimum, the portion of funding adequate for full implementation of the Plan that Board cannot provide, to the extent such funding is available to, or can be made available by, the United States.

(k) At this stage, considering the minimum level of funding for full Plan implementation that will be adequate for school year 1983-84, the amount of funds available (and potentially available) to the United States and Board, the levels of funding previously provided by the United States to desegregating school boards, and an equitable allocation of costs among the parties, this Court determines the obligation of the

United States for funding the Plan in school year 1983-84 is not less than $14.6 million. Further obligations of the United States for such funding in school year 1983-84 will be determined after a further hearing concerning Board's contentions described in Subparagraph 1(h) and after the United States has reported to this Court pursuant to Paragraph 2 as to the amount of funds available.

2. For the reasons stated in Paragraph 1, the United States is directed to undertake immediately an active and affirmative program of making every good faith effort to find and provide for school year 1983-84/(a) the $14.6 million referred to in Subparagraph 1(k) and (b) such further level of funding as may be determined by this Court. As n. 3 reflects, the particular form and details of the affirmative program, as well as the ultimate sources of the funding, are within the discretion of the United States, except that the program shall include the elements described below. On or before July 11, 1983 the United States is directed to formulate and submit to this Court the form and details of the affirmative program, with a clear designation of the persons responsible for leading and coordinating the program. It shall seek to implement that program within four weeks thereafter and shall submit weekly reports to this Court detailing its efforts and progress, the final report being due August 8, 1983. That affirmative program shall be designed to meet the obligations of the United States as defined in Paragraph 1 and shall specifically include each of the following efforts, to the extent necessary to meet those obligations:

(a) efforts to provide to Board the $8.98 million that remains unobligated and available for local desegregation assistance in the Secretary of Education's Discretionary Fund;

(b) efforts to provide to the Board the $52.058 million that remains unobligated and available for local desegregation assistance in the Department of Education's Special Programs and Populations Fund;

(c) efforts to secure congressional consent for the reallocation of excess funds from the Department of

Education's Guaranteed Student Loan Program into the Secretary's Discretionary Fund or another fund from which general support may be provided for implementation of the Plan;

(d) efforts to identify other available monies, or to reprogram or reallocate other excess monies, so that such funds may be provided as general support for the Plan;

(e) support of legislative initiatives that would provide desegregation funding to school districts that have entered into Consent Decrees that have been construed by courts to require efforts to provide such funding by the United States;

(f) efforts to eliminate any potential conflict between the obligations of the United States to Board and the Secretary of Education's intention to aid the grantees and projects that the Department of Education had contemplated funding from the Discretionary Fund and the Special Programs and Populations Fund, by attempting to fund such other grantees and projects from other sources; and

(g) cooperation with Board to identify all aspects of Board's desegregation activities that are or could be eligible for funding under Title IV.

That affirmative program, because it is the responsibility of the United States, shall not be limited to the Department of Education, but shall also include the Department of Justice, the Office of Management and Budget, and any other personnel or agencies of the United States whose participation is necessary for the program to be successful.

3. While the United States is carrying out its obligations to Board for school year 1983-84 as provided in Paragraph 2, it is necessary to protect Board against the obligation or expenditure by the United States of monies available for providing desegregation funding to Board. Accordingly this Court's June 8, 1983 Order preserving the status quo is further extended and modified as follows:

(a) Until August 10, 1983 the United States and its agent the Secretary of Education are directed to refrain

from expending, or taking any further action to obligate in any way, funds appropriated by Congress for the Secretary of Education's Discretionary Fund for fiscal years 1983 and 1984, and for certain other programs[59] in the Department of Education's Special Programs and Populations Account for fiscal year 1983 and 1984, except as provided in the following subparagraphs.

(b) This Order does not apply to the $10.725 million appropriated to the Discretionary Fund for fiscal year 1983 that is mandated by Congress, pursuant to 20 U.S.C. § 3851(b), to be expended for three specific programs, or to fiscal year 1984 funds the use of which is similarly mandated by Congress.

(c) This Order does not apply to unobligated Discretionary Funds in the amount of $50,000 that were exempted from the June 8 Order.

(d) This Order does not apply to Discretionary Funds in the amount of $9.059 million that were obligated by the Department of Education prior to the close of business on June 8, 1983, consisting of $7.687 million for the National Diffusion Network and $1.364 million for technology continuations, secondary school recognition and the National Commission on Excellence in Education.

(e) Funds in the five programs listed in n. 7 may be obligated and expended by the Secretary of Education in amounts that are necessary to enable all intended fiscal year 1983 grantees in those programs to operate at present levels up to August 15, 1983. No funds restrained by this Order may be obligated or expended for operations after August 15, and the Secretary of Education shall insure that the provision of funds until August 15 is accomplished so that it does not give rise to an obligation or claim for future funding. All such grantees shall first be required to extend their fiscal year 1982 projects (if any) to the extent that they have funds remaining for that purpose.[60] In the

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[59] Title IV, Women's Educational Equity, Follow-Through, Aid to the Virgin Islands and Territorial Teacher Training.

[60] By August 1 the United States shall submit a written report to the Court documenting that the amount provided to each grantee was reduced by the amount the grantee estimated would remain unexpended from its fiscal year 1982 grant under that program. Such amounts of remaining fiscal year 1982 funds shall be verified by the Department of Education from the final reports submitted by such grantees on or about September 30, 1983.

aggregate the amounts obligated and expended by the Secretary of Education pursuant to this subparagraph shall not exceed 11.5% of the fiscal year 1983 appropriation for the Special Programs and Populations Fund, which is $5.989 million.

4. There are various funds appropriated to the Department of Education for purposes other than desegregation, including the Guaranteed Student Loan Fund, that (a) are in excess of the amounts that are or will be needed for those purposes in this fiscal year and (b) potentially can be used by the United States to fulfill its obligations under the Consent Decree for school year 1983-84 and the following four years of implementation of the Board's Plan. To ensure to the greatest extent possible that such excess funds are not disposed of or otherwise rendered unavailable, the Executive Branch of the United States is directed to undertake an affirmative program to preserve the availability of such excess funds in the amount of $250 million. Both the form and details of that affirmative program shall be determined by the Executive Branch in its discretion except in the following respects (which shall be part of the program in any event):

(a) withdrawal of any pending proposal for the rescission by Congress of the appropriations for the excess funds, to the extent of $250 million;

(b) affirmative efforts by the Executive Branch to preserve the availability of excess funds in that amount; and

(c) such actions and legislative initiatives by the Executive Branch as are appropriate to set aside $250 million of excess funds in a reserve or escrow fund earmarked for potential use for fulfillment of the United States' obligations under the Consent Decree during the next five-year period.[61]

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[61] This Court will enter a further order concerning the terms and conditions of the escrow fund after further facts have been supplied it in that respect.

5. For the reasons stated in Conclusion 17, this preliminary injunction order is issued without Board's giving of security.

6. These proceedings are scheduled for further hearing at 2 p.m. August 10, 1983, for further consideration of the level of funding adequate for full implementation of the Plan, and other matters as appropriate.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-2308, 83-2402, 83-2445

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois.
No. 80 C 5124—Milton I. Shadur, *Judge.*

ARGUED AUGUST 25, 1983—DECIDED SEPTEMBER 9, 1983

Before CUMMINGS, *Chief Judge*, WOOD and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This is an appeal from a June 30, 1983, order of the district court, as modified by two orders entered on July 26, 1983, which interpreted and enforced a consent decree that was executed by the United States and the Board of Education of Chicago ("Board") in 1980. For the reasons set forth below, we affirm in part and vacate in part.

FACTS

On September 24, 1980, the United States filed a complaint against the Board charging that Chicago's public school system was racially segregated in violation of the

fourteenth amendment and titles IV and VI of the Civil Rights Act of 1964. On the same day, the parties filed a previously-negotiated consent decree ("Decree"), in which they agreed that the Board would develop and implement a system-wide plan to remedy the effects of past segregation of black and Hispanic students in Chicago schools. The Decree also provides, in ¶ 15.1, that

> [e]ach party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The Board developed and implemented a desegregation plan beginning in 1981. The district court upheld the constitutionality of the plan on January 6, 1983. *See United States v. Board of Education of Chicago*, 554 F. Supp. 912 (N.D. Ill. 1983).

On May 31, 1983, the Board filed a petition for an order directing the United States to comply with ¶ 15.1 of the Decree, and it requested declaratory and injunctive relief. Among other things, the Board asked the district court: (1) to find that the United States had violated ¶ 15.1; (2) to direct the United States to identify funds that could be made available to the Board for the desegregation plan; and (3) to order the United States to provide immediate financial assistance to the Board to the extent that funds were identified as available and needed by the Board to implement the plan.

After five days of hearings, the district court entered an order on June 30, 1983, ruling that while the Board had made every good faith effort to "find and provide every available form of financial resources," [1] the United States had not. The district court found that the United States had violated ¶ 15.1 by failing to provide available desegregation funding, by taking no affirmative steps to

[1] The United States does not challenge on appeal the finding that the Board acted in good faith.

find and provide such funding, and by taking affirmative steps to minimize and eliminate available sources of funding. The court ruled that the Decree obligates the United States to provide, from "available" federal funds, the level of funding that the Board needs to implement adequately its desegregation plan, and that the Board is unable to obtain from other sources. *United States v. Board of Education of Chicago*, No. 80 C 5124, order dated June 30, 1983 ("Order of June 30"). The court determined the obligation of the United States for funding the Board's desegregation plan in the 1983-84 school year to be not less than $14.6 million,[2] and it directed the United States to undertake an "active and affirmative program of making every good faith effort to find and provide" the $14.6 million and such further levels of funding as the district court may determine. *Id.* at 7-8.

The court identified three sources of federal funding that are potentially "available" to the Board to satisfy the federal government's commitment: approximately $8.9 million in the Secretary of Education's Discretionary Fund;[3]

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[2] Although this $14.6 million figure is identified in the district court's order as "the amount of additional incremental expenditures required by Board to achieve the necessary threshold level of funding for Educational Components in predominantly minority schools," Order of June 30 at 5, the court made no findings of fact with regard to this amount. This omission is significant and can be addressed by the district court during the proceedings that will be held on remand.

[3] Six percent of the funds appropriated under subchapter II of the Educational Consolidation and Improvement Act, 20 U.S.C. § 3811 *et seq.*, are reserved by the Secretary of Education to carry out the purposes specified in 20 U.S.C. § 3851. 20 U.S.C. § 3813(a). Out of the $28.765 million set aside for the Secretary's discretionary fund for fiscal year 1983, approximately $10.7 million must be used to fund the programs mandated by § 3851(b). Finding of Fact No. 42. Of the remainder, which the Secretary had discretion to spend within the broad limits of § 3851(a), the court determined that just under $9 million remained and was potentially available to the Board. Finding of Fact No. 43.

$24 million in Title IV funds;[4] and $28.08 million in the Special Programs and Populations Account.[5] In addition, the district court ordered the Executive Branch to identify and support any available legislative initiatives that would provide financial assistance to the Board for desegregation expenditures. To effectuate its order and to insure that the funds would remain available pending final resolution of the case, the court enjoined the United States from spending or obligating certain funds in the Secretary's Discretionary Fund and the Department of Education's Special Programs and Populations Account. Finally, the United States was ordered to undertake an affirmative program to preserve the continued availability of $250 million in excess Guaranteed Student Loan funds[6] and to support legislative initiatives to set aside

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[4] Title IV funds may be used to pay the cost of in-service training for school personnel in dealing with, and the cost of employment specialists in advising in, problems incident to desegregation. 42 U.S.C. § 2000c-4(a). The Secretary also is authorized to render technical assistance to school boards in the implementation of desegregation plans. 42 U.S.C. § 2000c-2. In making a Title IV grant, the Secretary is permitted to take into consideration any factors he finds relevant in addition to those specified by statute. 42 U.S.C. §2000c-4(b).

[5] The court's figure was derived from the following funds that were appropriated for Department of Education programs unrelated to desegregation and that the Executive Branch had requested Congress to rescind: $5.76 million for Women's Educational Equity, $19.44 million for Follow-Through, $960,000 for Territorial Training and $1.92 million for Aid to the Virgin Islands. Congress refused the administration's rescission request, and the court found that substantially all of the funds were not yet obligated to specific programs as of June 27, 1983. Finding of Fact No. 49. The money could be made available to the Board if the Secretary reprograms the funds to the Title IV program and awards additional Title IV money to the Board. Conclusion of Law No. 11.

[6] According to the Board, the administration has requested Congress to rescind the appropriation for $900 million in excess student loan funds, and the court ordered the Executive Branch to preserve part of that amount for potential use by Chicago. Appellee's Brief at 40. We note a lack of findings on this point, which should be rectified on remand.

this $250 million in an escrow fund, for potential use in fulfilling the United States' obligations under ¶ 15.1 over the next five years.

In appealing the district court's orders, the United States essentially raises two issues: first, whether the district court correctly interpreted the nature and extent of the United States' obligation under ¶ 15.1 of the Decree; and second, if its interpretation was correct, whether the remedies imposed by the district court constitute an abuse of discretion.

INTERPRETATION OF PARAGRAPH 15.1

In interpreting ¶ 15.1, the district court found that ¶ 15.1 imposes an obligation on the United States to do more than merely assist the Board in looking for and applying for federal funds. *See* Transcript of June 8, 1983, at 15; Transcript of June 27, 1983, at 23. Furthermore, the court determined that "the United States' promise to 'make every good faith effort' to find and provide available funds entails a serious and substantial obligation." Conclusion of Law No. 8. In line with this interpretation of ¶ 15.1, the district court concluded that, under this provision, the United States cannot work actively to make financial resources unavailable. Conclusion of Law No. 4. Finding that the United States had worked to make financial resources unavailable, the district court held that the United States violated its obligations under the Decree. Conclusion of Law No. 10.

In appealing the district court's ruling, the United States argues that the court erred in reading into ¶ 15.1 an elastic promise by the United States to fund for five years all of Chicago's education costs that are denominated by the Board as desegregation expenses, to give Chicago priority over other school districts and educational priorities in dispersing federal education funds, and to shape the legislative program and policy determinations of the Executive Branch to maximize federal assistance to Chicago. Appellant's Brief at 14-15. The

United States contends that ¶ 15.1 does not impose an obligation on its part to actually provide funds. According to the United States, ¶ 15.1 merely requires it to make a good faith effort to assist the Board in locating and applying for funds that have been earmarked by Congress for school districts undergoing desegregation. *Id.* at 17, 19. Thus, the United States argues essentially that money is "available" to the Board, within the meaning of ¶ 15.1, when funds have been appropriated for desegregation purposes and the Executive Branch has provided its assistance in the application and awarding process.

The Board responds that the district court properly construed ¶ 15.1 to require substantial efforts by the United States to actually provide financing, and to preclude the Executive Branch from deciding to provide virtually no desegregation funding, notwithstanding the availability of funds. Appellee's Brief at 11. The Board concedes that Congress has the exclusive power to determine availability, *see id.* at 14, but the Board maintains that, within the meaning of ¶ 15.1, "every available" refers to funds that are or might be made subject to the Department of Education's control, including those funds that the Department might obtain by seeking reappropriation or new legislation from Congress. *See id.* at 17, 18.

It is clear that consent decrees are construed according to precepts of contract construction. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975). Thus, the interpretation of consent decree provisions, like the interpretation of contract provisions, is a matter of law and subject to plenary review on appeal. *See Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982); *Fox v. United States Department of Housing and Urban Development*, 680 F.2d 315, 319 (3d Cir. 1982). The district court's views on interpretation, however, are entitled to deference. *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) ("[f]ew persons are in a better position to understand the meaning of a con-

sent decree than the district judge who oversaw and approved it").

In its conclusions of law accompanying the order of June 30, the district court stated that ¶ 15.1 is unambiguous in its terms and that extrinsic evidence is therefore unnecessary to a determination of its meaning. *See* Conclusion of Law No. 4. Nevertheless, the court examined the parol evidence offered by the United States and concluded that, if it had resorted to this evidence, its conclusions as to the meaning of ¶ 15.1 would be the same. *See id.*

We begin our review by finding the district court incorrect in its ruling that ¶ 15.1 is unambiguous. A provision is ambiguous if, after applying established rules of construction, it is reasonably susceptible to more than one meaning. *Richland Plantation Co. v. Justiss-Mears Oil*, 671 F.2d 154, 156 (5th Cir. 1982). Aside from the broad language that permeates all of ¶ 15.1, the word "available" is capable of more than one meaning, as evidenced by the arguments put forth by the parties, and as acknowledged by the district court itself. *See* Conclusion of Law No. 4 (" '[a]vailable' might alternatively be viewed . . ."). The district court therefore was required to look at extrinsic evidence in order to discern the meaning of ¶15.1. *Sportmart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313 (7th Cir. 1979). The district court's error in concluding that ¶ 15.1 is unambiguous is rendered harmless, however, by the fact that the court examined the parties' parol evidence and ruled that the evidence would not change the court's interpretation of ¶ 15.1.

The examination of extrinsic evidence is a question of fact, *Fox v. United States Department of Housing and Urban Development*, 680 F.2d at 319, and a finding based on extrinsic evidence will be set aside by the reviewing court only if it is clearly erroneous. *See International Merger & Acquisition Consultants, Inc. v. ARMAC Enterprises, Inc.*, 531 F.2d 821, 824 (7th Cir. 1976). Our own review of the relevant extrinsic evidence in this

case,[7] as well as a reading of the language of ¶ 15.1 itself, leads us to conclude that the district court did not err in holding that the United States' obligations under the Decree go beyond assisting the Board in locating and applying for federal funds, and that ¶ 15.1 imposes a substantial obligation on the government to provide available funds to the Board.

The district court's conclusion that the United States violated ¶ 15.1 was based in part upon a series of broad policy decisions made by the Executive Branch that had the effect of reducing the amount of federal funds provided to local educational agencies for desegregation expenses. These policy choices included requesting Congress to reduce or rescind appropriations for certain programs, supporting legislation that replaced direct grant programs with federal block grants, and supporting the dismantling of the Department of Education. Findings of Fact Nos. 14-21, 24.

Considering the state of the record before us, a significant constitutional issue may exist as to whether a finding of lack of good faith properly can be based upon such a series of sweeping Executive policy decisions and recommendations. That important question, however, need not be addressed at this time, in light of this court's direction regarding the remedies that may be appropriate in this case (see the discussion of remedies *infra*). Since the district court also found that the United States had funds available for use by the Board but failed to provide them to the Board, we choose to base our affirmance of the

[7] We find two pieces of evidence particularly supportive of the district court's interpretation. The first is that the government originally proposed that ¶ 15.1 obligates the parties to "search for" available financial resources; this language was later changed to "find and provide." Second, less than two months after signing the Decree, the Department of Education's general counsel wrote in a memorandum that one of the Department's responsibilities under the Decree was to "ensure that the Chicago School Board . . . receives the maximum amount of financial and technical assistance that this Department can provide."

finding of lack of good faith on this narrower and more discernible ground. Findings of Fact Nos. 34-35, 42-43.[8] Accordingly, based on the specific and limited factual findings that the United States failed to provide these available funds to the Board, we affirm the district court's ruling that the United States is in violation of ¶ 15.1.

REMEDIES

During the course of the five-day hearing in this case, the district court accepted, over the objection of the United States, evidence regarding the financial needs of the Board in implementing its desegregation plan. *See* Transcript of June 22, 1983, at 10-11. At the close of the hearing, the district court issued an opinion that contained, in addition to a finding of violation of ¶ 15.1 on the part of the United States, an order that the United States provide the Board with at least $14.6 million. Order of June 30 at 7. The court directed the United States to undertake an affirmative program of making every good faith effort to find and provide the $14.6 million and such other funding as the court may determine.[9] *Id.* at 7-8. This affirmative program is to in-

[8] There seems to be some discrepancy between Findings of Fact Nos. 34-35 and 42-43 on the one hand, which state that the Secretary of Education has authority to grant to the Board all or part of the unobligated funds in the Title IV Fund and in the Secretary of Education's Discretionary Fund, and Conclusion of Law No. 11 on the other hand, which states that it "appears" that the remaining Title IV funds and Discretionary funds may be available for use by the Board, although the district court "has not had the opportunity to verify their availability." This discrepancy, while troublesome, is not sufficient for us to overturn the factual findings that the Secretary of Education has authority to grant unobligated funds to the Board, and that these funds are thus available. The district court should verify the availability of these funds during the proceedings that will be held on remand.

[9] The district court decided that further obligations of the United States for the Board's desegregation funding for the 1983-84 school year would be determined at a later hearing. Order of June 30 at 7.

clude, to the extent necessary to meet the obligations of the United States: (1) efforts to provide the Board with funds that remain available for local desegregation assistance and that are located in the Secretary of Education's Discretionary Fund and the Special Programs and Populations Account (which includes Title IV monies); (2) efforts to secure congressional consent for the reallocation of excess funds from the Department's Guaranteed Student Loan Program into a fund from which support may be provided to implement the Board's desegregation plan; (3) efforts to identify other available monies or to reprogram or reallocate other excess monies; (4) support of legislative initiatives that would provide desegregation funding to school districts that have entered into consent decrees; (5) efforts to fund grantees and projects, which the Department had intended to fund through the Discretionary Fund and the Special Programs and Populations Account, with monies from other sources; and (6) cooperation with the Board to identify the Board's desegregation activities that are eligible for funding under Title IV. *Id.* at 8-9.

In its order of June 30, the district court also enjoined the United States from spending or taking action to obligate funds that are available for providing desegregation funding to the Board and that are located both in the Secretary of Education's Discretionary Fund and in the Department's Special Programs and Populations Account.[10] *Id.* at 10. In addition, the June 30 order

[10] This injunction, which is an extension and modification of the district court's preliminary injunction dated June 8, 1983, was to remain in effect until August 10, 1983, the date on which further hearings regarding remedies were scheduled. In an order dated July 26, 1983, the district court further extended the injunction until September 30, 1983.

The injunction exempts funds that are mandated by Congress for specific purposes, funds that were exempted from the June 8 injunction, funds that were obligated by the Department of Education prior to the close of business on June 8, 1983, and funds

(Footnote continued on following page)

directed the United States to undertake an affirmative program to preserve the availability of excess funds (including student loan funds) in the amount of $250 million that potentially can be used by the United States to fulfill its obligations under the Decree for the next five years.[11] *Id.* at 12.

We find that the district court acted with excessive dispatch in delineating specific remedies immediately after finding a violation of ¶ 15.1. Where another branch of government is found to be in violation of a court order, courts have shown a preference for allowing that branch to come into compliance voluntarily before imposing specific remedial measures. In *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977), the district court had found the state executive to be in violation of a court order requiring it to finance improvements in the conditions of state men-

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[10] *continued*
that are necessary to enable all fiscal-1983 grantees in five specific programs to operate at present levels up to August 15, 1983. Order of June 30 at 10-11. In another order dated July 26, 1983, the district court exempted additional funds that are necessary to enable the fiscal-1983 grantees in specific programs to operate at present levels up to September 30, 1983.

[11] According to the district court's order,

> [b]oth the form and details of [this] affirmative program shall be determined by the Executive Branch in its discretion except in the following respects (which shall be part of the program in any event):
>
> (a) withdrawal of any pending proposal for the rescission by Congress of the appropriations for the excess funds, to the extent of $250 million;
>
> (b) affirmative efforts by the Executive Branch to preserve the availability of excess funds in that amount; and
>
> (c) such actions and legislative initiatives by the Executive Branch as are appropriate to set aside $250 million of excess funds in a reserve or escrow fund earmarked for potential use for fulfillment of the United States' obligations under the Consent Decree during the next five year period.

Order of June 30 at 12-13 (footnote omitted).

tal hospitals, and had enjoined the enforcement of a state constitutional provision and a fiscal control statute so as to compel additional financing for the hospitals. The Eighth Circuit vacated the injunction, holding that once the district court determined that additional financing was constitutionally required it should have permitted the legislature to provide the financing on its own initiative, before resorting to the rather drastic measure of an injunction. In *Rhem v. Malcolm*, 507 F.2d 333 (2nd Cir. 1974), a case involving a successful constitutional challenge to conditions in a New York City pretrial confinement center, the district court had enjoined the city from further confining anyone in the detainment center after a certain date, but had indicated that it would vacate the injunction if the city submitted an acceptable remedial plan before that date. The Second Circuit vacated the injunction and remanded to the district court with instructions to allow the city to either submit a remedial plan or at least offer suggestions for a judicial remedy before actually imposing a remedial scheme of its own. The Second Circuit acknowledged that its approach might have the same ultimate effect as that of the district court, but noted that it had the "crucial practical advantage" of avoiding an unnecessary intrusion into the affairs of the executive and legislature. 507 F.2d at 340. *See also Duran v. Elrod*, No. 83-1574, slip op. at 11 (7th Cir. July 22, 1983) (where a consent decree to reduce overcrowding in state prisons was violated by state officials, the district court set a population ceiling after a series of hearings and "clearly left to the appropriate state and county agencies the determination of the means to reach the [ceiling]").

These decisions were appropriate judicial responses based on sound principles of comity that should apply to this case. The Department of Education claims to have been operating in the belief that its only obligations under ¶ 15.1 were to provide the Board with assistance in locating and applying for federal desegregation funds. Having informed the Department of its erroneous interpretation, the district court should provide the Department an opportunity to fashion its proposed remedy for

past noncompliance, as well as a chance to show that it intends to comply in the future, before structuring detailed remedial action that may still be necessary. Given the fact that the United States had been preliminarily enjoined from spending or obligating any available funds, there was no immediate need for the district court to devise specific remedies. Moreover, it is not clear from the record before us that the United States had an adequate opportunity to challenge the remedies selected by the district court, particularly the $14.6 million dollar figure. Thus, both the district court's designation of a specific dollar figure to be provided by the United States, and particularly its direction to the Executive Branch to set aside $250 million in escrow, were premature and inappropriate in this factual context and constituted an abuse of discretion.[12] We affirm, however, those portions of the district court's July 26 orders temporarily freezing certain federal funds until September 30 but exempting additional funds. *See* note 10. Given the possibility that these funds might otherwise be spent and given the need to protect the interests of the Board by preserving the status quo, we find that the district court did not abuse its discretion by imposing the freeze.

Accordingly, we affirm the finding of a violation on the grounds previously noted, we affirm the injunction against spending unobligated funds, and we vacate all other remedies and remand for further proceedings not inconsistent with this opinion. Our prior stay is vacated, and our mandate shall issue forthwith.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[12] This court recognizes that the district court made only a preliminary determination on the question of remedies and that it scheduled a hearing for August 10, 1983, in order to determine further remedies.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* BOARD OF EDUCATION OF THE CITY OF CHICAGO, *Defendant.*	No. 80 C ____ (Entered September 24, 1980)

CONSENT DECREE

1. The United States has filed a complaint alleging that the Board of Education of the City of Chicago (the "Board") has engaged in acts of discrimination in the assignment of students and otherwise, in violation of federal law. The United States alleges further that such acts have had a continuing system-wide effect of segregating students on a racial and ethnic basis in the Chicago public school system.

2. In addition, the United States Department of Health, Education and Welfare ("HEW") in 1979 and in 1980 found the Board ineligible for funding under the Emergency School Aid Act on the basis of its determinations that the Chicago public school system is characterized by racially segregated and overcrowded schools. Following a presentation of facts by the Board in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

3. The Board neither admits nor denies the allegations of the complaint in this action. It recognizes, however, that the Chicago public school system is characterized by substantial racial isolation of students.

4. The Board believes that racial isolation is educationally disadvantageous to all students and that educational benefits

will accrue to all students through the greatest practicable reduction in the racial isolation of students.

5. The Board believes that litigation of this action would require a substantial expenditure of public funds and a substantial commitment of Board and staff time and resources, at a time when financial and personnel resources are already greatly limited, and that such resources can more appropriately be used to achieve the educational goals of the school system. The parties further believe that litigation of this action would be protracted and that settlement of the action is in the public interest.

6. In light of these considerations, the parties, as indicated by the signatures of their counsel below, have determined to settle this action and resolve the United States' request for injunctive relief by entry of this consent decree. The parties submit to the jurisdiction of the Court and acknowledge that subject matter jurisdiction exists over this action under the Fourteenth Amendment of the United States Constitution; under Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d; and under 28 U.S.C. § 1345. The Board waives the notice provisions of those acts. Both parties waive the entry of findings of fact and conclusions of law. Each party shall bear its own costs.

7. Both parties agree that this Consent Decree is final and binding as to the issues resolved herein. The Court shall retain jurisdiction of this action for all purposes, until a final order is entered terminating this litigation.

8. In the event that objections or challenges are raised (e.g., through intervention or separate collateral lawsuits) to the lawfulness or appropriateness of (a) this decree, any provision hereof, or proceedings pursuant hereto, or (b) any aspect of the desegregation plan provided for in Part I hereof after approval of the plan by the Department of Justice or by the Court, the Board and the Department of Justice shall defend the lawfulness and appropriateness of the matter chal-

lenged. If any such collateral lawsuit arises in state court, the parties shall seek to remove such action to the U.S. District Court.

WHEREFORE, the parties having freely given their consent, the terms of the Decree being within the scope of the complaint, and the terms of the Decree being fair, reasonable and adequate, it is hereby ORDERED, ADJUDGED, and DECREED that:

I. STUDENT DESEGREGATION

1. *Systemwide Remedy.* The Chicago Board of Education (the "Board") will develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students.

2. *Basic Objectives.*

2.1 *Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.

2.2 *Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.

2.3 *Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.

2.4 *Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group.

3. *Board Discretion in Plan Development.*

3.1 *Board Discretion in Selecting from Alternatives.* The Department of Justice recognizes that there is a broad range of constitutionally acceptable plans that will fulfill the basic objectives stated in Part 2. The Department of Justice further recognizes the Board's familiarity with and sensitivity to the unique situation presented in Chicago, and the authority of the Board, in its discretion, to select from within the constitutional range the plan that best meets the needs of the Chicago School District.

3.2 *Racial/Ethnic Balance or Specific Ratios Not Required.* The parties recognize that courts have not required specific racial ratios in schools as a necessary remedy in desegregation cases, that racial and ethnic balance throughout the Chicago School District is neither practicable nor required, and that no particular definition of a desegregated school is required.

4. *Techniques.* In establishing desegregated schools, the Board may use the following techniques, among others:

4.1 *Voluntary Techniques.*

4.1.1 Permissive transfers that enhance desegregation, with transportation at Board expense.

4.1.2 Magnet schools that enhance desegregation.

4.1.3 Voluntary pairing and clustering of schools.

4.1.4 If magnet schools or other voluntary techniques are used, each shall contain racial/ethnic goals and management controls (e.g., an alternative that would require mandatory re-assignments) to ensure that the goals are met.

4.2 *Mandatory Techniques Not Involving Transportation.*

4.2.1 Redrawing attendance areas.

4.2.2 Adjusting feeder patterns.

4.2.3 Reorganization of grade structures, including creation of middle schools.

4.2.4 Pairing and clustering of schools.

4.2.5 Selecting sites for new schools and selecting schools for closing to enhance integration.

4.3 *Mandatory Reassignment and Transportation.* Mandatory reassignment and transportation, at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient to meet the objective states in § 2.1. The plan may limit the time or distance of mandatory transportation to ensure that no student shall be transported for a time or distance that would create a health risk or impinge on the educational process. These limitations may vary among different age and grade levels.

4.4 *Priority and Combination of Techniques.* The plan may rely upon the techniques listed above and any other remedial methods in any combination that accomplishes the objective stated in § 2.1.

5. *Exceptions.*

5.1 *Justification for Remaining Identifiable Minority Schools.* With respect to any schools that remain identifiable as Black or Hispanic schools, the plan shall provide specific justification in terms of practicability (i.e., educational or practical considerations), in the context of the extent to which the plan as a whole achieves the objectives stated in Part 2.

5.2 *Stably Integrated Schools.* The plan may create exceptions with respect to individual schools which it shows are already stably integrated (or will become stably integrated by the time of implementation of the plan).

5.2.1 *Initial Exception.* The plan may exclude such schools from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in § 2.1.

5.2.2 *Subsequent Exception.* The plan may provide for the later exclusion from student reassignment of any initially included school that, through demographic changes or other factors, promises to become stably integrated.

5.2.3 *Subsequent Inclusion.* The plan should include sufficient flexibility to enable any of the techniques outlined above to be applied to any school in which stability of integration is threatened by unforeseen circumstances.

6. *Bilingual Education.* The Board's legal obligations to provide bilingual education for non- and limited-English speaking students shall be discharged in a manner consistent with the overall objectives of the plan. To the extent that students who require bilingual education are reassigned, they shall not be reassigned in a manner that interferes with their participation in bilingual programs.

7. *Compensatory Programs in Schools Remaining Segregated.* To accomplish the objective stated in § 2.2, the plan will include specific programs for Black or Hispanic schools remaining segregated, in the following areas among others:

7.1 Remedial and compensatory educational programs.

7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that

validly measure student achievement) for academic, vocational and alternative educational studies.

7.3 Pre-service and in-service instruction for administrators, principals, teachers and other school personnel.

7.4 Selection, and evaluation of the performance of, principals and supporting leadership staff.

7.5 Testing, counseling, guidance and student welfare.

7.6 Physical facilities, safety and security.

7.7 Supportive relationships between such schools and groups and institutions in the community and in government.

8. *Overcrowding.* The Board is encouraged but not required to eliminate overcrowded schools. The plan should provide, to the greatest extent practicable considering all the circumstances, for the elimination of racially disproportionate overcrowding of classrooms and school sites.

9. *Discipline.* The plan shall include provisions to ensure that discipline is administered in a non-discriminatory manner. discipline is administered in a non-discriminatory manner.

10. *Resegregation.* The plan shall contain provisions to ensure against resegregation of students after implementation, in the following areas:

10.1 *In-School.* The plan shall include provisions to ensure that students attending desegregated schools are not resegregated within their schools without adequate educational justification. This provision shall apply to the assignment of students to classrooms as well as to programs of instruction.

10.2 *Student Reassignment.* The plan shall include provisions to ensure that students shall not be reassigned in a manner that, considering the district as a whole, causes the resegregation of schools.

10.3 *Structural Adjustments.* The plan shall include provisions to ensure that site selections, construction, school closings, readjustments of attendance areas and fedder patterns, and new placement of mobile classrooms shall be accomplished so as not to cause the resegregation of schools.

10.4 *Educational Program Adjustments.* The plan shall include provisions for utilization in desegregated schools of such of the specific programs referred to in Part 7 hereof as the Board concludes are necessary to ensure against resegregation of such schools.

11. *Facilitating Success of the Desegregation Process.*

11.1 *Community Involvement.* The plan will establish programs to promote public involvement with and support for the desegregation process.

11.2 *School Personnel.* The plan will provide for pre-service and in-service training programs for Board personnel such as administrators, teachers, auxiliary staff, bus drivers and monitors.

11.3 *Other Institutions.* The Board shall endeavor to involve in the desegregation process state and local government, private businesses, colleges and universities, civic and community organizations, labor unions, professional organizations, religious and cultural institutions, the parochial school system and other private schools.

12. *Voluntary Interdistrict Pupil Transfers.* The plan will include provisions, including without limitation the payment of transportation costs, to encourage and facilitate voluntary interdistrict pupil transfers having integrative effects between schools in the Chicago School District and schools in other districts in the Chicago Standard Metropolitan Statistical Area ("SMSA").

13. *Reporting.* The plan shall establish a system of record-keeping and reporting through which the Board's compliance with the provisions of this agreement can be monitored.

14. *Flexibility.* The parties to this agreement recognize that neither the principles set forth above nor the desegregation plan can provide for every contingency and that exceptions will be necessary. The burden is on the Board, however, to justify such exceptions on the basis of educational and practical considerations.

15. *Financial Cost of the Plan.*

15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

15.2 Each party reserves the right to seek to add additional parties who may be legally obligated to contribute to the cost of the desegregation plan.

15.3 The parties recognize that financial cost of implementation does not excuse the failure to develop a desegregation plan consistent with the principles set forth in §§ 2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in § 2.1.

16. *Time Table.* The plan will be developed in accordance with the schedule set forth in Attachment A and will be implemented beginning with the 1981-82 school year.

17. *Public Participation.* The Board will receive and consider comments and recommendations from all persons and groups during the development of the desegregation plan.

18. *Resolution of Disagreements.* If the parties to this decree are unable to agree as to whether the desegregation plan

is consistent with the principles set forth above in §§ 2 through 15, the disagreement will be submitted to the court for resolution.

II. ADDITIONAL PROGRAMS AND PARTIES

1. *Interagency Coordination.* The Department of Justice agrees that it will, pursuant to the Attorney General's authority (including that under Executive Order 11764 to coordinate the enforcement of Title VI of the Civil Rights Act of 1964), initiate and carry forward discussions with other agencies of the federal government to bring about a coordinated affirmative administration of federal grant programs in the Chicago SMSA with the goal of contributing to the creation and maintenance of stably integrated schools in the Chicago SMSA. These federal programs include, for example, housing, employment and transportation in addition to education.

2. *State Responsibility.*

2.1 The Department of Justice will thoroughly pursue and promptly complete its investigation of whether the State of Illinois should be made a party defendant and be required to assist and support, financially and otherwise, the implementation of the desegregation plan discussed in Part I. The investigation will examine whether the State and/or its agencies have contributed, through action and inaction, to the segregation of, or other discrimination against, students in the Chicago School District.

2.2 Upon completion of the investigation the Department will submit the factual findings thereof to the Court and, if warranted by the results of the investigation, promptly take such enforcement action as is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

3. *Interdistrict Remedies.*

3.1 The Department of Justice will thoroughly pursue and promptly complete its examination of the extent to which interdistrict remedies for segregative conditions in schools in the Chicago school district may be appropriate, including (without limitation) by reason of the possibilities that:

3.1.1 The State of Illinois together with school districts in the Chicago SMSA, or some of them, may have acted in effect as a metropolitan school district with respect to vocational, special and other educational programs; and

3.1.2 The State of Illinois together with State housing agencies and other agencies of state government, including units of local government in the Chicago SMSA, or some of them, may have contributed to the segregation of the races in the Chicago SMSA by racially discriminatory use of state or federal housing laws or programs, or of state or local land use control laws.

3.2 Upon completion of the investigation, the Department will submit the factual findings thereof to the Court and will take whatever enforcement action is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

4. LEAA Grant Condition. The Department of Justice agrees that the entry of this consent decree is a sufficient basis for the removal, from the grant awarded by the Law Enforcement Assistance Administration to the Board on September 10, 1980 (#80-JS-AX-0043), of the condition relating to Title VI of the 1964 Civil Rights Act and § 815 of the Criminal Justice Improvement Act of 1979.

III. OTHER ISSUES

1. *Classroom Segregation.* The Board will promptly implement a plan to ensure that no student is assigned to a

racially/ethnically isolated or identifiable classroom except when the assignment is justified educationally. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under the Emergency School Aid Act ("ESAA") for Fiscal year 1979, which was found acceptable by the Department of Health, Education and Welfare ("HEW") and is presently acceptable to the Department of Education.

2. *Bilingual Programs.* The Board will promptly implement a plan to ensure that non- and limited English speaking students are provided with the instructional services necessary to assure their effective participation in the educational programs of the Chicago School District. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

3. *Faculty Assignment.* The Board will promptly implement a plan to assure that the assignment of full-time classroom teachers to schools will be made in such a manner that no school is identified as intended for students of a particular race, color or national origin. Except as specifically provided herein, the plan shall be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

3.1 Not later than November 1, 1981, with respect to the full-time classroom teachers in each school faculty, the racial/ethnic composition and the proportion of experienced teachers will be between plus and minus fifteen percent of the systemwide proportions of such teachers with respect to such characteristics, and the range of educational training will be substantially the same as exists in the system as a whole.

3.2 The Board will make every good faith effort to follow professional staff assignment and transfer practices which, when taken together as a whole on a frequently reviewed periodic basis, will assure that the racial composition, the experience and the educational background of individual school faculties and administrative staff more nearly approach* the city-wide proportions of minority, experienced, and more extensively trained professional staff; provided, however, that nothing in this Plan shall require the assignment or transfer of any person to a position for which he or she is not professionally qualified. The Board will not adopt or follow assignment and transfer practices which will foreseeably result in the racial identifiability of schools based on faculty or administrative staff composition or in unequal distribution of experienced and more extensively trained staff.

3.3 The failure of a particular school or schools to meet the guidelines will not constitute noncompliance with the above guidelines if the district provides a detailed satisfactory explanation justifying such failure to meet the guidelines.

_____

Date

ENTER:

_____

UNITED STATES DISTRICT JUDGE

_____

* Plus or minus ten percentage points of city-wide averages for race, experience and training for each type of school facility.

THE UNDERSIGNED CONSENT TO THE ENTRY OF THIS DECREE:

DREW S. DAYS III
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ATTACHMENT A

TIME TABLE FOR PLAN DEVELOPMENT

The following timetable will be followed by the Board pursuant to Part I, § 16, except as modified by agreement between the Board and the Department of Justice or as extended by leave of Court:

October 15, 1980	Appointment of principal plan development consultant(s)
November 17, 1980	Progress report to Justice Department
December 4, 1980	Identification of plan components appropriate for funding in the basic and magnet categories under the Emergency School Aid Act and submission of appropriate funding proposals to the Department of Education
December 15, 1980	Progress report to Justice Department
January 15, 1981	Progress report to Justice Department
February 16, 1981	Progress report to Justice Department
	Prior to adoption of a plan by the Board, the Board will publish the proposed plan and hold public hearings thereon.
March 11, 1981	Completion of final plan and adoption of plan by the Board. The plan will be conveyed to the Justice Department and filed with the Court.

Opinion by Judge Flaum

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 26, 1984.

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 84-2405 *vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 80 C 5124
Milton I. Shadur,
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the District Court's 1984 opinion and 1984 remedial order are VACATED, with costs, and the cause is REMANDED, with instructions, in accordance with the opinion of the Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 30, 1984

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 84-24-2405 *vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 80 C 5124
MILTON I. SHADUR, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellee, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Section 405 of Title IV of the Civil Rights Act of 1964 provides:

(a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of—

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

(42 U.S.C. 2000C-4; Pub.L. 88-352, July 2, 1964; 78 Stat. 247.)

Section 565 of the Education Consolidation and Improvement Act of 1981 provides:

(a) From the sum made available each year under section 563, the State educational agency shall distribute not less than 80 per centum to local educational agencies within such State according to the relative enrollments in public and nonpublic schools within the school districts of such agencies, adjusted, in accordance with criteria approved by the Secretary, to provide higher per pupil allocations to local educational agencies which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child, such as—

(1) children from low-income families.

(2) children living in economically depressed urban and rural areas, and

(3) children living in sparsely populated areas.

(b) The Secretary shall approve criteria suggested by the State educational agency for adjusting allocations under subsection (a) if such criteria are reasonably calculated to produce an equitable distribution of funds with reference to the factors set forth in subsection (a).

(c) From the funds paid to it pursuant to section 563 and 564 during each fiscal year, the State educational agency shall distribute to each local educational agency which has submitted an application as required in section 566 the amount of its allocation as determined under subsection (a).

(20 U.S.C. 3815, P. L. 97-35, Title V, Subtitle D, August 13, 1981; 95 Stat. 471).

Section 577 of the Education Consolidation and Improvement Act of 1981 provides:

Programs and projects authorized under this subchapter include—

(1) the acquisition and utilization

(A) of school library resources, testbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools which shall be used for instructional purposes only, and

(B) of instructional equipment and materials suitable for use in providing education in acedemic subjects for use by children and teachers in elementary and secondary schools which shall be used for instructional purposes only,

which take into account the needs of children in both public and private schools based upon periodic consultation with teachers, librarians, media specialists, and private school officials;

(2) the development of programs designed to improve local educational practices in elementary and secondary schools, and particularly activities designed to address educational problems such as the education of children with special needs (educationally deprived children, gifted and talented children, including children in private schools);

(3) programs designed to assist local educational agencies, upon their request, to more effectively address educational problems caused by the isolation or concentration of minority group children in certain schools if such assistance is not conditioned upon any requirement that a local educational agency which assigns students to schools on the basis of geographic attendance areas adopt any other method of student assignment, and that such assistance is not made available for the transportation of students or teachers or for the acquisition of equipment for such transportation;

(4) comprehensive guidance, counsel- ing, and testing programs in elementary and secondary schools and State and local support services necessary for the effective implementation and evaluation of such programs (including those designed to help prepare students for employment);

(5) programs and projects to improve the planning, management and implementation of educational programs, including fiscal management, by both State and local

educational agencies, and the cooperation of such agencies with other public agencies;

(6) programs and projects to assist in teacher training and in-service staff development, particularly to better prepare both new and in-service personnel to deal with contemporary teaching and learning requirements and to provide assistance in the teaching and learning of educationally deprived students; and

(7) programs and projects to assist local educational agencies to meet the needs of children in schools undergoing desegregation and to assist such agencies to develop and implement plans for desegregation in the schools of such agencies.

(20 U.S.C. 3832; P. L. 97-35; Title V, August 13, 1981; 95 Stat. 474.)

Section 583 of the Education Consolidation and Improvement Act of 1981 provides:

(a) From the sums reserved by the Secretary pursuant to the second sentence of section 563(a) [20 USCS § 3813(a)] the Secretary is authorized to carry out directly or through grants to or contracts with State and local educational agencies, institutions of higher education, and other public and private agencies, organizations, and institutions, programs and projects which—

(1) provide a national source for gathering and disseminating information on the effectiveness of programs designed to meet the special educational needs of educationally deprived children, and others served by this subtitle [20 USCS §§ 3801 et seq.], and for assessing the needs of such individuals, including programs and projects formerly authorized by section 376 of the Elementary and

Secondary Education Act of 1965 and programs and projects formerly funded under the "National Diffusion Network" program;

(2) carry out research and demonstrations related to the purposes of this subtitle [20 USCS §§ 3801 et seq.];

(3) are designed to improve the training of teachers and other instructional personnel needed to carry out the purposes of this subtitle [20 USCS §§ 3801 et seq.]; or

(4) are designed to assist State and local educational agencies in the implementation of programs under this subtitle [20 USCS §§ 3801 et seq.].

(b) From the funds reserved for the purposes of this section, the Secretary shall first fund

(1) the Inexpensive Book Distribution Program (as carried out through "Reading is Fundamental") as formerly authorized by part C of title II of the Elementary and Secondary Education Act of 1965,

(2) the programs of national significance in the "Arts in Education" Program as formerly authorized by part C of title III of such Act, and

(3) programs in alcohol and drug abuse education as formerly authorized by the Alcohol and Drug Abuse Education Act,

at least in amounts necessary to sustain the activities described in this sentence at the level of operations during fiscal year 1981, and then utilize the remainder of such funds for the other authorized activities described in subsection (a).

(20 U.S.C. 3851; P.L. 97-35, Title V, Subtitle D, August 13, 1981; 95 Stat. 476.)

The Appropriations Act for the Department of Education for fiscal year 1984 provides, in pertinent part:

An Act making appropriations for the Departments of Labor, Health and Human Services, Education, and related agencies, for the fiscal year ending September 30, 1984, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any moeny in the Treasury not otherwise appropriated, for the Departments of Labor, Health and Human Services, and Education, and related agencies, for the fiscal year ending September 30, 1984, and for other purposes, namely:

****

TITLE III—DEPARTMENT OF EDUCATION

****

SPECIAL PROGRAMS

For carrying out the consolidated programs and projects authorized under chapter 2 of the Education Consolidation and Improvement Act of 1981; title IX, part C of the Elementary and Secondary Education Act; title IV of the Civil Rights Act of 1964; the Follow Through Act; sections 1524 and 1525 of the Education Amendments of 1978; and Public Law 92-506, $527,867,000: Provided, That $450,655,000 to carry out the State block grant program authorized under chapter 2 of the Education Consolidation and Improvement Act shall become available for obligation on July 1, 1984, and shall remain available until September 30, 1985: Provided further, That $28,765,000 for the purpose of subchapter D of the Education Consolidation and Improvement Act shall become available for

obligation on October 1, 1983: Provided further, that $1,000,000 of the amount appropriated above for the purpose of Public Law 92-506 shall become available on July 1, 1984, and shall remain available until September 30, 1985.

****

GENERAL PROVISIONS

****

Sec. 309. No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for Northern District of Illinois on June 30, 1983: Provided, That the court's decree entered on September 24, 1980, shall remain in full force and effect.

(Public Law 98-139, October 31, 1983; 97 Stat. 888, 895)

The Appropriations Act for the Department of Education provides, in pertinent part:

An Act making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies, for the fiscal year ending September 30, 1985, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 1985, and for other purposes, namely:

****

TITLE III—DEPARTMENT OF EDUCATION

****

SPECIAL PROGRAMS

For carrying out the consolidated programs and projects authorized under chapter 2 of the Education Consolidation and Improvement Act of 1981, $531,909,000, of which $31,909,000 shall be for programs and projects authorized under subchapter D of said Act, including $10,700,000 for programs and projects authorized under subsection 583(a)(1) of said Act; $6,052,000 shall be used for awards, which, except for educational television programming, are not to exceed a cumulative amount of $1,000,000 to any recipient for national impact demonstration of research projects; $7,000,000 for activities authorized under subsection 583(b)(1) of said Act; $3,157,000 for programs authorized under subsection 583(b)(2) of said Act; $3,000,000 for programs authorized under subsection 583(b)(3) of said Act; and $2,000,000 for activities authorized under subsection 583(b)(4) of said Act: Provided, That $500,000,000 to carry out the State block grant program authorized under chapter 2 of said Act shall become available for obligation on July 1, 1985, and shall remain available until September 30, 1986; Provided further, That $31,909,000 for the purpose of subchapter D of said Act shall become available for obligation on October 1, 1984.

For grants to State education agencies and desegregation assistance centers authorized under section 403 of the Civil Rights Act of 1964, $24,000,000.

For carrying out activities authorized under title IX, part C of the Elementary and Secondary Education Act, $6,000,000.

For carrying out activities authorized under section 1524 of the Education Amendments of 1978, $2,700,000.

For carrying out activities authorized under section 1525 of the Education Amendments of 1978, $2,000,000.

For carrying out activities authorized under Public Law 92-506, as amended, $1,500,000: Provided, That said sum shall become available on July 1, 1985, and shall remain available until September 30, 1986.

For carrying out the provisions of title VII of the Education for Economic Security Act, relating to magnet schools assistance, $75,000,000: Provided, That not more than $4,000,000 in the fiscal year may be paid to any single eligible local educational agency: Provided further, That amounts appropriated under this sentence shall be available October 1, 1984.

****

GENERAL PROVISIONS

****

Sec. 309. No funds appropriated in any Act to the Department of Education for fiscal years 1984 and 1985 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for Northern District of Illinois on June 30, 1983.

(Public Law 98-619, November 8, 1984; 98 Stat. 3321, 3329)

34 Code of Federal Regulations Part 760

SECRETARY'S DISCRETIONARY PROGRAM

SUBPART A—GENERAL

Sec. 760.1 What is the Secretary's Discretionary Program?

Sec. 760.2 Who is eligible for a grant under the Secretary's Discretionary Program?

Sec. 760.3 What regulations apply to the Secretary's Discretionary Program?

Sec. 760.4 What definitions apply to this program?

SUBPART B—WHAT TYPES OF PROJECTS DOES THE SECRETARY ASSIST UNDER THIS PROGRAM?

760.10 What types of projects does the Secretary assist under this program?

760.11 Does the Secretary establish priorities for this program?

SUBPART C—HOW DOES ONE APPLY FOR A GRANT?

760.20 What assurance must an applicant make?

SUBPART D—HOW DOES THE SECRETARY MAKE A GRANT?

Sec. 760.30 How does the Secretary evaluate an application?

Sec. 760.31 What selection criteria does the Secretary use?

Sec. 760.32 How does the Secretary select an application for funding?

SUBPART E—WHAT CONDITIONS MUST BE MET BY THE GRANTEE?

Sec. 760.40 May the Secretary restrict the use of funds under this program?

Sec. 760.41 May program funds be used for construction purposes?

AUTHORITY: Sec. 583 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3851), unless otherwise noted.

SUBPART A—GENERAL

§ 760.1 WHAT IS THE SECRETARY'S DISCRETIONARY PROGRAM?

The Secretary's Discretionary Program supports projects designed to meet the special educational needs of educationally deprived children or to improve elementary and secondary education for children consistent with the purposes of the Education Consolidation and Improvement Act of 1981.

(20 U.S.C. 3851)

§ 760.2 WHO IS ELIGIBLE FOR A GRANT UNDER THE SECRETARY'S DISCRETIONARY PROGRAM?

State educational agencies (SEA's), local educational agencies (LEA's), institutions of higher education, and other public and private agencies, organizations, and institutions are eligible for a grant under the Secretary's Discretionary Program.

(20 U.S.C. 3815)

§ 760.3 WHAT REGULATIONS APPLY TO THE SECRETARY'S DISCRETIONARY PROGRAM?

(a) The following regulations apply to grants made under the Secretary's Discretionary Program:

(1) The Education Department General Administrative Regulations (EDGAR) established in Title 34 of the Code of Federal Regulations in Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions), and Part 78 (Education Appeal Board).

(2) The regulations in this Part 760.

(b) The regulations in this Part 760 do not apply to—

(1) Contracts awarded under the Secretary's Discretionary Program; and

(2) Grants and contracts awarded under any grant program, such as the National Diffusion Network, for which the Secretary issues separate regulations.

Note.—Grants awarded under the National Diffusion Network are subject to the regulations in 34 CFR Part 796.

(20 U.S.C. 3851, 3474)

§ 760.4 WHAT DEFINITIONS APPLY TO THIS PROGRAM?

(a) Definitions in EDGAR. The following terms used in these regulations are defined in 34 CFR Part 77:

Applicant
Application
Award
Budget
Department
EDGAR
Local educational agency
Minor remodeling
Nonprofit
Private
Project
Public
Secretary
State education agency

(b) Definitions that apply to this Part.

The following definitions apply to this Part:

"Children" means persons(1) Up to age 21 who are entitled to a free public education not above grade 12; or

(2) Who are of preschool age.

"Construction" means the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, improving, or extending school facilities; and the inspection and supervision of the construction of school facilities.

(20 U.S.C. 3875)

"ECIA" means Education

Consolidation and Improvement Act of 1981.

"Educationally deprived children" means children whose educational attainment is below the level that is appropriate for children of their age.

(20 U.S.C. 3851; 3474)

SUBPART B—WHAT TYPES OF PROJECTS DOES THE SECRETARY ASSIST UNDER THIS PROGRAM?

760.10 WHAT TYPES OF PROJECTS DOES THE SECRETARY ASSIST UNDER THIS PROGRAM?

(a) The Secretary may fund projects that—

(1) Provide a national source for gathering and disseminating information on the effectiveness of programs designed to meet the special educational needs of educationally deprived children and others served by the ECIA, and for assessing the needs of such individuals;

(2) Carry out research and demonstrations related to the purposes of the ECIA;

(3) Are designed to improve the training of teachers and other instructional personnel needed to carry out the purpose of the ECIA; or

(4) Provide technical assistance to SEA's and LEA's in the implementation of programs under the ECIA.

(b) The Secretary may not provide general operating revenue to meet local needs to any applicant under this program.

(20 U.S.C. 3851)

§ 760.11 DOES THE SECRETARY ESTABLISH PRIORITIES FOR THIS PROGRAM?

(a) Each year, through one or more notices published in the Federal Register, the Secretary announces the priorities for this program, if any, and the manner in which those priorities will be implemented.

(b) The Secretary selects priorities by taking into consideration unmet national needs within the scope of the ECIA.

(c) The Secretary may also fund any project that does not meet an established priority if the project—

(1) Is limited to activities—

(i) That are at the elementary or secondary education level; or

(ii) That were specifically authorized by one of the programs consolidated in the ECIA as listed in section 561 of the ECIA except as limited by the ECIA; and

(2) Satisfies all other requirements for funding under this program.

(d) If the Secretary selects priorities, the Secretary may establish a separate competition for each priority selected.

If a separate competition is established for a priority, the Secretary may reserve all applications that relate to that priority for review under the separate competition.

(e) The Secretary may decline to fund a project that is eligible for funding under a specific Department of Education grant competition.

Note.-EDGAR establishes the method for applying priorities. See 34 CFR 75.105 (Annual priorities).

(20 U.S.C. 3851; 3474)

SUBPART C—HOW DOES ONE APPLY FOR A GRANT?

§ 760.20 WHAT ASSURANCE MUST AN APPLICANT MAKE?

An applicant must make an assurance in its application that it will comply with the provisions of section 586 of the ECIA, governing equitable participation of private school children in the purposes and benefits of Chapter 2, if the applicant—

(a) Is an LEA; and

(b) Proposes to use grant funds to provide—for the benefit of public school students—services, materials, or equipment (including training for teachers or other personnel serving the school children).

Note.—EDGAR establishes requirements for private school children participation. See 34 CFR 75.650.

(20 U.S.C.3862)

(Approved by the Office of Management and Budget under control number 1880-0505)

SUBPART D-HOW DOES THE SECRETARY MAKE A GRANT?

§ 760.30 HOW DOES THE SECRETARY EVALUATE AN APPLICATION?

(a) The Secretary evaluates an application submitted under this program on the basis of the criteria in Section 760.31 of this part.

(b) The Secretary may award up to 100 points, including a reserved 15 points to be distributed in accordance with paragraph (d) of the section, based on the criteria in Section 760.31.

(c) Subject to paragraph (d) of this section, the maximum possible points for each criterion is indicated in parentheses after the heading for each criterion.

(d) For each competition, as announced through a notice published in the Federal Register, The Secretary may distribute the reserved 15 points among the criteria listed in Section 760.31.

(20 U.S.C. 3851; 3774)

(Approved by the Office of Management and Budget under control number 1880-0505)

760.31 WHAT SELECTION CRITERIA DOES THE SECRETARY USE?

The Secretary uses the following criteria in evaluating each application:

(a) Plan of operation. (20 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows--

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purposes of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective;

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly; and

(vi) For applicants required to provide an opportunity for participation of students enrolled in private schools—a clear description of how the applicant will provide that opportunity.

(b) Quality of key personnel. (15 points)

(1) The Secretary reviews each application for information that shows the quality of the key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to used in the project;

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project;

(iv) The extent to which the applicant, as a part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training, in fields related to the objectives of the project, as well as other information that the applicant provides.

(c) Budget and cost effectiveness. (5 Points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) Evaluation plan. (5 Points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. Cross-reference—See EDGAR 34 CFR 75.590 (Evaluation by the grantee).

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) Adequacy of resources. (5 Points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(f) Improving elementary and secondary education. (10 Points)

(1) The Secretary reviews each application for information that shows the extent to which the project contributes to the improvement of elementary and secondary education.

(2) The Secretary looks for information such as—

(i) The objectives of the project; and

(ii) The manner in which the objectives of the project further the purpose of improving elementary and secondary education.

(g) National significance. (15 Points)

(1) The Secretary reviews each application for information that shows the national significance of the project.

(2) The Secretary looks for information that shows the extent to which the project makes a contribution of national significance, as measured by factors such as—

(i) The extent to which the project addresses educational problems of national significance;

(ii) The extent to which the project meets specific national needs as shown by—

(A) The needs addressed by the project;

(B) The manner in which the applicant identified those needs;

(C) The manner in which those needs are met by the project; and

(D) The benefits to be gained by meeting those needs;

(iii) The extent to which the project involves techniques that are innovative;

(iv) The extent to which the project builds upon and adds to current educational information and research; and

(v) The extent to which the project provides a model or other information that could be used by others to solve educational problems.

(h) Applicant's commitment and capacity. (10 Points)

The Secretary looks for information that shows the extent of the applicant's commitment to the project, its capacity to continue the project, and the likelihood that it will build upon the project when Federal assistance ends.

(20 U.S.C. 3851; 3474)

(Approved by the Office of Management and Budget under control number 1880-0505)

§ 760.32 HOW DOES THE SECRETARY SELECT AN APPLICATION FOR FUNDING?

(a) After evaluating the applications according to the criteria contained in Section 760.31, the Secretary may determine whether or not the most highly rated applications are broadly and equitably distributed throughout the Nation for each competition.

(b) The Secretary may select other applications for funding if doing so would improve the geographical distribution of projects funded under a particular competition.

(20 U.S.C. 3851; 3474)

(Approved by the Office of Management and Budget under control number 1880-0505)

SUBPART E—WHAT CONDITIONS MUST BE MET BY THE GRANTEE?

§ 760.40 MAY THE SECRETARY RESTRICT THE USE OF FUNDS UNDER THIS PROGRAM?

The Secretary may restrict the amount of funds made available through a grant under this program that may be used to purchase equipment.

(20 U.S.C. 3851)

§ 760.41 MAY PROGRAM FUNDS BE USED FOR CONSTRUCTION PURPOSES?

(a) No recipient may use grant funds for repairs, minor remodeling, or construction of private school facilities.

(b) To the extent necessary for an LEA to carry out its responsibility under section 596 of the ECIA to provide an opportunity for the equitable participation of private school children, an LEA may use grant funds for the construction of public facilities.

(c) Subject to the restrictions in paragraph (a) of this section, a recipient may use grant funds for repairs or minor remodeling only to the extent necessary to carry out an approved project under the regulations in this part.

(20 U.S.C. 3851; 3474)

(Issued in 49 Federal Register 43226, 43227—43229; October 26, 1984)

(3)

84-1366

No.

Office - Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chicago Public Schools

Racial/Ethnic Composition 1970–1983

Year	Membership	White		Black		Other		Hispanic	
		No.	%	No.	%	No.	%	No.	%
1970	577,679	199,669	34.6	316,711	54.8	4,925	.9	56,374	9.7
1971	574,495	188,312	32.8	320,797	55.8	5,608	1.0	59,778	10.7
1972	558,825	173,143	31.0	317,975	56.9	5,729	1.0	61,978	11.1
1973	544,971	160,846	29.5	314,089	57.6	6,306	1.2	63,730	11.7
1974	536,657	151,290	28.2	310,880	57.9	6,535	1.2	67,952	12.7
1975	526,716	141,264	26.8	307,549	58.4	7,589	1.5	70,314	13.4
1976	524,221	130,785	24.9	311,261	59.4	8,343	1.6	73,832	14.1
1977	512,052	118,713	23.2	306,997	59.9	9,071	1.8	77,271	15.1
1978	494,988	106,581	21.5	299,590	60.5	9,191	1.9	79,526	16.1
1979	477,339	95,513	20.0	289,920	60.7	9,958	2.1	81,948	17.2
1980	458,497	85,292	18.6	278,726	60.8	10,253	2.2	84,226	18.4
1981	442,889	76,112	17.2	269,019	60.7	11,003	2.5	86,755	19.6
1982	435,843	71,171	16.3	264,530	60.7	11,396	2.6	88,746	20.4
1983	434,042	67,829	15.6	263,163	60.6	11,283	2.6	91,763	21.2

Racial/Ethnic Composition Summary—October 1983

Type of School	Total Students	White		Black		Hispanic		Other	
		#	%	#	%	#	%	#	%
Elementary	314771	44592	14.2	191163	60.7	71287	22.7	7729	2.5
Secondary	111557	21216	19.0	67770	60.7	19206	17.2	3365	3.1
Special	7714	2021	26.2	4230	54.8	1274	16.5	189	2.4
Systemwide	434042	67829	15.6	263163	60.6	91767	21.2	11283	2.6

SUMMARY OF OCTOBER 31, 1983, STUDENT RACIAL/ETHNIC SURVEY
(By Level and Type of School)

ELEMENTARY LEVEL

NO.	TYPE OF SCHOOL	TOTAL STUDENTS	WHITE NON-HISPANIC		BLACK NON-HISPANIC		AMERICAN IND. ALASKAN NATIVE		ASIAN OR PACIFIC ISLANDER		MEXICAN		PUERTO RICAN		CUBAN		OTHER HISPANIC		TOTAL HISPANIC	
			#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
400	Regular Elementary*	271,769	39,010	14.4	163,212	60.0	400	0.1	6,136	2.3	38,621	14.2	20,059	7.4	696	0.3	3,635	1.3	63,011	23.2
19	Academic Magnet Centers*	11,715	2,653	22.6	5,910	50.4	19	0.2	305	2.6	1,843	15.7	735	6.3	55	0.5	195	1.7	2,828	24.1
14	Community Academies	11,155	112	1.0	8,635	77.4	13	0.1	73	0.6	1,343	12.0	903	8.0	4	0.3	72	0.6	2,322	20.8
6	Scholastic Academies	3,849	1,161	30.2	1,876	48.7	22	0.6	224	5.8	321	8.3	169	4.4	14	0.4	62	1.6	566	14.7
6	Language Academies	2,445	899	36.8	1,006	41.2	8	0.3	66	2.7	353	14.4	67	2.7	3	0.1	43	1.8	466	19.1
5	Classical Schools	1,209	368	30.4	660	54.6	6	0.5	75	6.2	50	4.1	36	3.0	—	—	14	1.2	100	8.3
6	Middle Schools	5,348	253	4.7	4,159	77.8	33	0.6	216	4.0	219	4.1	404	7.6	6	0.1	58	1.1	687	12.9
4	Upper Cycles	2,058	93	4.5	867	42.1	4	0.2	107	5.2	880	42.8	70	3.4	7	0.3	30	1.5	987	48.0
7	E V G Centers	795	6	0.8	718	90.3	—	—	—	—	21	2.6	49	6.2	—	—	1	0.1	71	8.9
25	Child Parent Centers	4,428	37	0.8	4,120	93.0	3	0.1	19	0.4	115	2.6	127	2.9	—	—	7	0.2	249	5.6
492	**Totals**	**314,771**	**44,592**	**14.2**	**191,163**	**60.7**	**508**	**0.2**	**7,221**	**2.3**	**43,766**	**13.9**	**22,619**	**7.2**	**785**	**0.2**	**4,117**	**1.3**	**71,287**	**22.7**

* Includes branches

SECONDARY LEVEL

44	General/Technical*	76,632	17,255	22.5	42,097	54.9	94	0.1	2,046	2.7	7,351	9.6	6,277	8.2	230	0.3	1,282	1.7	15,140	19.8
9	Vocational*	13,970	665	4.8	12,394	88.7	7	0.1	57	0.4	508	3.6	266	1.9	10	0.1	63	0.4	847	6.1
7	Metropolitan	10,332	2,414	23.4	4,967	48.0	65	0.6	905	8.8	1,363	13.2	311	3.0	78	0.8	229	2.2	1,981	19.2
5	Academies/Magnet Schools	10,623	882	8.3	8,312	78.2	6	0.1	185	1.7	1,084	10.2	118	1.1	6	0.1	30	0.3	1,238	11.7
65	**Totals**	**111,557**	**21,216**	**19.0**	**67,770**	**60.7**	**172**	**0.2**	**3,193**	**2.9**	**10,306**	**9.2**	**6,972**	**6.3**	**324**	**0.3**	**1,604**	**1.4**	**19,206**	**17.2**

* Includes branches

OTHER SCHOOLS/PROGRAMS

37	Special Schools**	7,714	2,021	26.2	4,230	54.8	18	0.2	171	2.2	948	12.3	237	3.1	14	0.2	75	1.0	1,274	16.5

** Included are schools for the physically and mentally handicapped, students with special needs, bilingual education, adult education and apprentice programs. Students on elementary, secondary, and post-secondary levels are served.

CITYWIDE SUMMARY

594	**Totals**	**434,042**	**67,829**	**15.6**	**263,163**	**60.6**	**698**	**0.2**	**10,585**	**2.4**	**55,020**	**12.7**	**29,828**	**6.9**	**1,123**	**0.3**	**5,796**	**1.3**	**91,767**	**21.2**

Racial/Ethnic Composition of Chicago Public Schools

by Grades

GRADE	MEMBERSHIP	% WHITE	% BLACK	% OTHER	% HISPANIC
Pre-Sch., Sp. Ed.	1,115	22.2	57.6	1.5	18.7
Sp. Ed., Elem.	10,235	16.9	68.5	0.9	13.6
Pre-Kg., Bilingual	342	1.5	5.0	0.3	93.3
Pre-Kindergarten	4,308	3.6	84.5	1.5	10.4
Head Start	6,174	5.7	72.9	2.6	18.8
Kindergarten	31,121	15.6	57.4	2.1	25.0
Grade 1	33,896	14.2	58.6	2.4	24.9
Grade Pre-2	4,691	9.7	59.3	1.8	29.3
Grade 2	32,838	13.3	59.0	2.3	25.4
Grade 3	32,333	13.4	59.4	2.4	24.9
Grade 4	31,106	13.5	59.7	2.6	24.1
Grade 5	32,430	13.9	60.9	2.7	22.6
Grade 6	32,953	14.2	61.9	2.7	21.3
Grade 7	32,073	15.7	60.7	2.8	20.8
Grade 8	31,952	16.6	61.1	3.1	19.2
Grade 9	34,874	15.8	62.3	2.5	19.4
Grade 10	30,849	18.7	61.5	2.8	17.1
Grade 11	23,998	20.7	58.3	3.8	17.2
Grade 12	17,540	25.3	55.4	4.1	15.3
Sp. Ed., H.S.	6,623	13.3	77.8	0.7	8.2
Non-Graded	315	4.1	90.2	-	5.7
Satellite	332	3.6	85.2	-	11.2
Apprentices	1,944	62.9	24.7	1.7	10.5
Total	434,042	15.6	60.6	2.6	21.2

Program	As Shown on Page 1 of Exhibit 28	As Revised to Reflect the Term of the Costs Set Forth in the Program Sheets Included in Exhibit 28 *	As Revised by Exhibit 117 to Reflect Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect (A) Full Implementation of the Effective Schools Project, at Level I and Level II Schools (B) Partial Implementation at Level III Schools (C) Consideration of Non-Recurring Costs and (D) Assumed Continuation of Incremental Board Funding in 1984-85		As Revised to Reflect the Effect of the 5% Salary Increase Implemented in 1983-84	
Effective Schools							
Level I	$ 20,841,218	$ 20,841,218	$ 21,741,218	~~$ 24,476,273~~	$ 22,408,163	~~$ 25,037,712~~	$ 23,269,602
Level II	-----	-----	-----	20,288,726		21,093,741	
Trainers Institute	563,678	563,678	567,678	144,599		167,211	
Racially Identifiable Schools - Level II	17,000,000	17,000,000	17,000,000	-----		-----	
Level III	-----	-----	-----	10,000,000		10,000,000	
Management Information	371,230	371,230	371,230	46,230		48,079	
Affirmative Action	364,475	364,475	364,475	136,666		136,666	
Equity Compliance	564,808	564,808	564,808	406,562		416,107	
Staff Development	2,760,495	2,760,495	1,847,519	~~1,474,319~~	1,288,390	~~1,535,761~~	1,358,0
Within School Segregation	134,425	134,425	134,425	134,425		139,592	
Magnet Schools	19,678,850	19,407,350	19,407,350	~~19,407,350~~	17,967,350	~~19,607,895~~	8,916,895
Special Education/ Testing	2,017,870	2,017,870	2,017,870	563,608***		606,613	
Vocational/Tech Education	25,991,634	24,423,954	22,648,444 ~~24,468,599~~**	~~24,018,639~~****	22,197,484*****	~~24,018,639~~	21,547,987
Curriculum	6,280,433	6,280,433	6,280,433	4,604,339		~~4,796,478~~	3,883,289

Program	As Shown on Page 1 of Exhibit 28	As Revised to Reflect the Term of the Costs Set Forth in the Program Sheets Included in Exhibit 28 *	As Revised by Exhibit 117 to Reflect Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect (A) Full Implementation of the Effective Schools Project, at Level I and Level II Schools (B) Partial Implementation at Level III Schools (C) Consideration of Non-Recurring Costs and (D) Assumed Continuation of Incremental Board Funding in 1984-85		As Revised to Reflect the Effect of the 5% Salary Increase Implemented in 1983-84	
Student Discipline	$6,963,390	$6,963,390	$6,963,390	$6,963,390		$7,233,940	
Bilingual Education	4,514,215	4,483,257	4,478,257	~~4,296,153~~	$4,136,703	~~4,486,323~~	$4,321,386
Evaluation	738,747	738,747	738,747	701,226		718,513	
Total	$108,785,468	$106,915,330	$106,945,999	~~$117,362,505~~	$111,987,861	~~$120,043,270~~	$103,858,642

* With regard to the Magnet Schools, Vocational/Technical Education and Bilingual Education components, the amount shown on p. 1 of Exhibit 28 does not equal the sum of the costs shown for each of the program elements included therein. This column reflects the projected total costs for these program elements, as reflected by the program budget sheets included in Exhibit 28.

** As revised by Exhibit 116 with respect to the Vocational Assessment program element (Viso Testimony) and Board Post-Trial Brief.

*** Reflects consideration of $222,655 of incremental Board funds available for other purposes (Special Education—Reassessment Validation) and assumes this amount will be used to fund other elements of the Special Education component.

**** See accompanying chart for Vocational Education program elements.

Program	As Reflected in the Budget Sheets Set Forth in Exhibit 28	As Revised by Exhibit 117 to Reflect the Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect the Consideration of Non-Recurring Costs and the Assumed Continuation of Incremental Board Funding in 1984–85		As Revised to Reflect the Effect of 5% Salary Increase Implemented in 1983–84	
Staff Development						
Racially Identifiable School	$2,181,470	$1,268,494	~~$ 895,294~~	$ 709,365	~~$ 932,012~~	$ 755,263
Staff Development—100 Schools	579,025	579,025	579,025		603,749	
Total	$2,760,495	$1,847,519	~~$1,474,319~~	$1,288,390	~~$1,535,761~~	$1,359,021
Magnet Schools						
Residential High School	$ 9,251,000	$ 9,251,000	$ 9,251,000		~~$ 9,251,000~~	-0-
School for Agricultural Sciences	3,000,000	3,000,000	3,000,000		3,006,152	
Program Expansion	3,001,600	3,001,600	3,001,600		3,079,480	
Staff Development	2,017,500	2,017,500	~~2,017,500~~	577,500	~~2,028,375~~	588,375
Centralized Enrollment	121,250	121,500	121,500		126,088	
Bus Aides	2,016,000	2,016,000	2,016,000		2,116,800	
Total	$19,407,350	$19,407,350	~~$19,407,350~~	$17,967,350	~~$19,607,895~~	$8,916,895
Special Education/Testing						
Special Ed/Testing/ Transition	$1,452,870	$1,452,870	$786,263		$818,963	
Assessment Techniques	565,000	565,000	-222,655		-212,350	
Total	$2,017,870	$2,017,870	$563,608		$606,613	

Program	As Reflected in the Budget Sheets Set Forth in Exhibit 28	As Revised by Exhibit 117 to Reflect the Correction of Errors and Duplications		As Revised by Exhibit 117 to Reflect the Consideration of Non-Recurring Costs and the Assumed Continuation of Incremental Board Funding in 1984–85		As Revised to Reflect the Effect of 5% Salary Increase Implemented in 1983–84	
Vocational/Tech Education							
Community Resource Data Bank	$ 311,750	$ 311,750		~~$ 306,017~~	$ 305,543	~~$ 306,017~~	$ 305,543
Washburne Trade School	14,125,000	14,125,000		~~13,865,251~~	13,843,753	~~13,865,251~~	13,843,753
Maximizing Training Levels	30,000	30,000		~~29,448~~	29,403	~~29,448~~	29,403
Vocational Articulation	955,660	955,660		~~938,086~~	936,632	~~938,086~~	936,632
Handicapped Component	662,692	662,692		~~650,505~~	649,497	~~650,505~~	-0-
Limited English Proficient Component	989,020	989,020		~~970,832~~	969,327	~~970,832~~	969,327
Student Service Corporation	771,902	771,902		~~757,707~~	756,532	~~757,707~~	756,532
Vocational Assessment	6,577,930	~~6,623,575~~*	4,802,420*	~~6,500,793~~	4,706,798	~~6,500,793~~	4,706,798
Total	$24,423,954	~~$24,468,599~~	$22,648,444	~~$24,018,639~~**	22,197,484**	~~$24,018,639~~***	$21,547,987***

* As revised by Ex. 116. (Viso Testimony) and Post-Trial Brief.

** All items funded in 1983–84 are considered non-recurring costs. (Brady Testimony) Unfunded recurring costs for 1984–85 are allocated proportionately among program elements.

*** No revision is made to reflect 5% salary increase as a result of the pro rata allocation of "unfunded recurring" costs among program elements.

Program	As Reflected in the Budget Sheets Set Forth in Exhibit 28	As Revised by Exhibit 117 to Reflect the Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect the Consideration of Non-Recurring Costs and the Assumed Continuation of Incremental Board Funding in 1984–85	As Revised to Reflect the Effect of 5% Salary Increase Implemented in 1983–84	
Curriculum					
Staff—Program Planning	$ 144,688	$ 144,688	$ 387,856*	$ 387,856**	
Computer System	15,230	15,230	*	**	
Staff—Program Review	198,244	198,244	198,244	201,944	
High School Renaissance Program	1,213,839	1,213,839	867,849	~~913,189~~	-0-
Staff—Implementation	527,481	527,481	*	**	
Summer Curriculum Writing Teams	196,380	196,380	196,380	206,174	
Bureau of Language Arts	385,831	385,831	385,831	399,162	
Intensive Writing Improvement Program	1,823,820	1,823,820	1,823,820	1,908,195	
Staff—Coordination of New Programs	586,361	586,361	*	**	
CMLMP Handbook	47,822	47,822	47,822	50,135	
Paideia Programs	998,352	998,352	554,152	583,219	
Assistants—Bureau of Language Arts	142,385	142,385	142,385	146,604	
Total	$6,280,433	$6,280,433	$4,604,339	~~$4,796,478~~	$3,883,289

* With respect to funding provided in 1983–84, these four program elements have been aggregated. The amount of $387,856 reflected in this column represents the total "unfunded recurring" costs for all four program elements.

** No revision is made to reflect 5% salary increase for these four program elements.

Program	As Reflected in the Budget Sheets Set Forth in Exhibit 28	As Revised by Exhibit 117 to Reflect the Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect the Consideration of Non-Recurring Costs and the Assumed Continuation of Incremental Board Funding in 1984-85		As Revised to Reflect the Effect of 5% Salary Increase Implemented in 1983-84	
Bilingual Education						
Immersion Programs	$ 358,041	$ 358,041	$ 358,041		$ 372,144	
Evaluation Activities	697,270	697,270	~~697,270~~	537,894	~~721,599~~	556,662
Recruitment	86,972	86,972	47,668		50,668	
Statewide Network	5,000	—	—		—	
Advisory Council	3,000	3,000	3,000		3,000	
Public Involvement	390,781	390,781	390,781		406,412	
Translation Activities	154,544	154,544	~~103,781~~	103,707	109,611	
Parent Institute	36,500	36,500	36,500		36,500	
Instructional Materials	350,000	350,000	297,453		297,963	
Staff Development	204,365	204,365	168,699		192,346	
Gifted Programs	155,610	155,610	155,610		159,386	
Haitian Bilingual Center	60,306	60,306	56,556		57,756	
Curriculum Development	1,935,132	1,935,132	1,935,132		2,031,889	
Training of Teachers	45,736	45,736	45,736		47,049	
Total	$4,483,257	$4,478,257	~~$4,296,153~~	$4,136,703	~~$4,486,323~~	$4,321,386

Program	As Reflected in the Budget Sheets Set Forth in Exhibit 28	As Revised by Exhibit 117 to Reflect the Correction of Errors and Duplications	As Revised by Exhibit 117 to Reflect the Consideration of Non-Recurring Costs and the Assumed Continuation of Incremental Board Funding in 1984-85	As Revised to Reflect the Effect of 5% Salary Increase Implemented in 1983-84
Evaluation				
Native Language Assessment	$ 36,684	$ 36,684	$ 36,684	$ 38,112
Local School Development Program	678,596	678,596	641,075	656,634
ESEA Title VII Bilingual Desegregation Support	23,467	23,467	23,467	23,767
Total	$ 738,747	$ 738,747	$701,226	$718,513

FOUR-YEAR DESEGREGATION ANALYSIS SUMMARY

	1980-81		1981-82		1982-83		1983-84
	Budget	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget
512							
Salaries/Benefits	2,235,246	2,356,958	3,764,333	3,601,101	3,539,343	3,752,259	4,035,843
Supplies	13,461	11,209	19,001	11,470	12,002	8,286	16,002
Rentals	170,595	114,300	87,492	87,492	78,039	78,030	72,000
Repairs	48,641	33,338	60,411	59,071	71,363	71,078	126,576
Trans. of Students	7,341,895	6,963,492	9,177,200	9,225,468	5,265,320	6,551,234	5,395,000
Carfare	163,800	304,804	506,304	503,693	1,368,184	803,698	975,000
Other	17,387	10,698	200,130	1,313	25,887	2,651,671	1,584
TOTAL:	9,991,025	9,794,799	13,814,871	13,489,608	10,360,138	13,916,256	10,622,005
163							
Salaries/Benefits	-0-	34,810	9,205,834	6,872,280	9,636,899	10,310,833	10,846,644
Supplies	-0-	-0-	600,000	555,463	10,000	9,086	10,500
Prof. Services	-0-	-0-	200,000	212,945	178,000	82,694	403,000
Printing	-0-	-0-	25,000	26,213	44,200	31,543	54,200
Auto Reimb.	-0-	-0-	18,200	10,681	10,578	10,570	10,146
Trans. of Students	-0-	-0-	25,000	22,399	-0-	-0-	-0-
Miscellaneous	-0-	-0-	850,328	461,605	-0-	-0-	644,117
Other	-0-	-0-	5,097	2,318	10,340	9,903	31,393
TOTAL:	-0-	34,810	10,929,459	8,163,904	9,890,017	10,454,629	12,000,000
946-947							
Salaries/Benefits	-0-	-0-	12,774,889	10,614,838	9,256,002	11,674,698	8,984,764
Textbooks	-0-	-0-	1,943,460	1,813,482	2,797,806	1,949,908	1,168,137
Supplies	-0-	-0-	524,647	1,816,377	-0-	523,624	-0-
Miscellaneous	-0-	-0-	2,184,030	257,276	4,373,701	-0-	5,177,156
Equipment	-0-	-0-	-0-	-0-	-0-	579,139	-0-
Other	-0-	-0-	-0-	-0-	-0-	42,054	78
TOTAL:	-0-	-0-	17,427,026	14,501,973	16,427,509	14,769,423	15,330,135

FOUR-YEAR DESEGREGATION ANALYSIS SUMMARY

	1980-81		1981-82		1982-83		1983-84
	Budget	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget
536/Title VII							
Salaries/Benefits	-0-	-0-	488,143	477,562	280,503	206,941	487,329
Prof. Svcs.	-0-	-0-	35,395	15,472	47,075	32,557	25,169
Auto Reimb.	-0-	-0-	5,589	2,443	7,433	5,139	3,489
Textbooks	-0-	-0-	26,080	11,400	34,687	23,982	7,976
Printing	-0-	-0-	72,653	31,758	96,628	66,807	262
Supplies	-0-	-0-	39,121	17,100	52,030	35,973	3,050
Other	-0-	-0-	7,451	3,259	9,911	6,851	4,718
TOTAL:	-0-	-0-	674,432	558,994	528,267	378,250	531,993
576/Chap. II Grant							
Salaries/Benefits	-0-	-0-	1,298,172	1,475,802	1,286,714	1,124,569	1,425,791
Prof. Svcs.	-0-	-0-	211,090	146,417	215,788	131,020	52,603
Equipment	-0-	-0-	66,930	46,425	68,420	41,543	6,000
Travel	-0-	-0-	36,040	24,998	36,842	22,370	135,000
Printing	-0-	-0-	5,149	3,571	5,263	3,196	17,000
Textbooks	-0-	-0-	82,376	57,138	84,210	51,130	270
Other	-0-	-0-	113,268	78,565	115,788	70,304	83,148
TOTAL:	-0-	-0-	1,813,025	1,832,916	1,813,025	1,444,132	1,719,812

FOUR-YEAR DESEGREGATION ANALYSIS SUMMARY

	1980–81		1981–82		1982–83		1983–84
	Budget	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget
065–067							
Salaries/Benefits	-0-	-0-	-0-	-0-	10,588,555	5,063,462	6,997,005
Textbooks	-0-	-0-	-0-	-0-	210,400	350,037	1,492,445
Trans. of Students	-0-	-0-	-0-	-0-	5,805,000	5,104,707	8,880,000
Supplies	-0-	-0-	-0-	-0-	350,400	372,293	95,000
Equipment	-0-	-0-	-0-	-0-	869,845	1,358,831	97,180
Other	-0-	-0-	-0-	-0-	61,800	43,230	7,696
TOTAL:	-0-	-0-	-0-	-0-	17,886,000	12,292,560	17,569,326
496/Deseg. Expan.-Board Funds							
Salaries	-0-	-0-	-0-	-0-	-0-	-0-	2,000,000
Trans. of Students	-0-	-0-	-0-	-0-	-0-	-0-	2,000,000
Expan. of Program Elements of Educational Components	-0-	-0-	-0-	-0-	-0-	-0-	6,000,000
TOTAL:	-0-	-0-	-0-	-0-	-0-	-0-	10,000,000
400/Deseg. Expan.-Yates Bill							
Salaries	-0-	-0-	-0-	-0-	-0-	-0-	14,060,346
Textbooks	-0-	-0-	-0-	-0-	-0-	-0-	1,444,060
Supplies	-0-	-0-	-0-	-0-	-0-	-0-	1,220,521
Prof. Svcs.	-0-	-0-	-0-	-0-	-0-	-0-	733,928
Repairs	-0-	-0-	-0-	-0-	-0-	-0-	1,374,797
Trans. of Students	-0-	-0-	-0-	-0-	-0-	-0-	365,220
Equipment	-0-	-0-	-0-	-0-	-0-	-0-	725,095
Other	-0-	-0-	-0-	-0-	-0-	-0-	76,033
TOTAL:	-0-	-0-	-0-	-0-	-0-	-0-	20,000,000
GRAND TOTALS:	9,991,025	9,829,609	44,658,813	38,547,395	56,904,956	53,255,250	87,773,271

Office - Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1366

In the Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted a consent decree between the United States and the Board of Education of the City of Chicago as requiring that the United States provide federal funds for purposes of desegregation in Chicago only from programs that could be used, consistent with the intent of Congress, to fund desegregation efforts.

2. Whether the district court's award of almost $104 million as a penalty for the United States' alleged "bad faith" under the consent decree was appropriate under the circumstances of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1366

BOARD OF EDUCATION OF THE CITY OF CHICAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 744 F.2d 1300. The findings of fact and conclusions of law of the district court (Pet. App. 18a-215a) are reported at 588 F. Supp. 132. The remedial order of the district court (Pet. App. 216a-233a) is reported at 592 F. Supp. 967. Earlier findings of fact and conclusions of law of the district court in this case and an accompanying order (Pet. App. 234a-268a) are reported at 567 F. Supp. 272. The prior opinion of the court of appeals (Pet. App. 269a-281a) is reported at 717 F.2d 378.

JURISDICTION

The judgment of the court of appeals (Pet. App. 297a) was entered on September 26, 1984, and the petition for rehearing was denied on November 30, 1984 (Pet. App.

298a). A petition for a writ of certiorari was filed on February 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, petitioner Chicago Board of Education (the Board) applied to the United States Department of Health, Education, and Welfare for a grant under the Emergency School Aid Act, 20 U.S.C. (Supp. V 1979) 3191 *et seq.* On April 9, 1979, HEW notified the Board that it was ineligible for a grant because the Chicago school system was racially and ethnically segregated in violation of the law, and the Board had failed to initiate an adequate plan to desegregate (Complaint ¶ 7). After the Board failed to rebut HEW's findings or to devise a satisfactory desegregation plan (*id.* at ¶ 8), HEW referred the matter to the Justice Department for appropriate enforcement action pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*. Another Emergency School Aid grant application from Chicago was rejected in 1980 for the same reasons (Complaint ¶ 4). Negotiations ensued between representatives of the Attorney General and of the Board.

On September 24, 1980, the United States filed a complaint in the United States District Court for the Northern District of Illinois, together with a proffered consent decree. The complaint alleged that the Board had established and maintained racial and ethnic segregation of students in the City of Chicago public schools in violation of the Fourteenth Amendment and Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d *et seq.*. The consent decree, entered by the district court the same day, required the Board to develop a plan to desegregate the

schools and to remedy the effects of past segregation of black and Hispanic students (Pet. App. 282a-284a).[1]

One of the principal topics of discussion during negotiation of the consent decree was the Board's concern that it not again be denied federal financial assistance for its schools (GX 1, Docket Nos. 18, 21, 22, 23a). The United States refused to guarantee federal funding "specific as to form and amount * * * in the context of the Consent Decree" (Pet. App. 27a-28a). The parties agreed, however, in paragraph 15.1 of the decree, that (Pet. App. 290a):

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The district court approved the desegregation plan formulated by the Board on January 6, 1983. 554 F. Supp. 912 (N.D. Ill. 1983). During the 1980-1981 school year, the Department of Education provided the Board two Title IV grants totalling $321,439, and an out-of-cycle Emergency School Aid grant of $1,813,025, all of which was available for implementation of the desegregation plan. During the school year 1982-1983, the Department of Education provided the Board $5.385 million in block grant funds, of

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[1]Petitioner asserts (Pet. 4) that the Board agreed to implement a desegregation plan because of a supposed "United States financial commitment." But the decree itself demonstrates that the Board was charged with maintaining a racially segregated school system (Pet. App. 282a, ¶ 1, 2) and that the Board settled the case to eliminate the "racial isolation" of students (*id.* at 282a-283a, ¶ 4) and to avoid the costs and risks of litigation (*id.* at 283a, ¶ 5).

which the Board chose to expend $1.8 million on the desegregation plan and the remaining $3.5 million on other educational programs. Pet. App. 236a.[2]

On May 31, 1983, the Board filed a "Petition * * * for an Order Directing Compliance by the United States with Provisions of the Consent Decree Concerning Financial Support." The district court issued Findings of Fact and Conclusions of Law on June 30, 1983 (Pet. App. 234a) and entered an order (*id.* at 259a). The district court concluded that the United States had violated its obligation under paragraph 15.1 in a number of ways. First, the court found that there were funds in the Department of Education's appropriation for Fiscal Year 1983 for which the Board was theoretically eligible: funds allocated under Title IV of the Civil Rights Act of 1964 for desegregation related purposes (42 U.S.C. 2000c-4), and at least some of the funds in the Secretary's Discretionary Fund (20 U.S.C. 3851(a)) (Pet. App. 255a-256a).[3] Additionally, the court found that the FY 1983 Title IV funds were appropriated along with funds for other programs into an account called "Special [Programs] and Populations" (*id.* at 256a). According to the court, there was nothing to prevent the Secretary from diverting other funds in this account to the Chicago Board (*ibid.*) The court held that the United States had violated paragraph 15.1 by failing to make "every good faith effort" to provide these "available" funds to the Board (Pet. App. 255).

Second, the court noted that in 1981, the Executive Branch had adopted a policy of phasing out categorical grants and grants to individual school districts in favor of

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[2]Petitioner's assertion (Pet. 6) that "the Executive Branch, including particularly the Department of Education, determined that no material financial assistance should be provided by the Federal government to the Board for its desegregation programs" is unsupported and untrue.

[3]The Secretary's Discretionary Fund is a small portion of the Education Consolidated and Improvement Act of 1981 (ECIA), 20 U.S.C. 3801 *et seq.*. Most of the ECIA is dedicated to block grants.

block grants to states for redistribution by the states to local school districts on a per capita basis. The court regarded this policy as a violation of the consent decree because it reduced the amount of funds potentially available to the Board.[4] Similarly, legislative initiatives of the Executive to reduce the total amount of federal financial assistance available to school districts, not to request larger appropriations from the Congress for Title IV or the Discretionary Fund, and to phase out direct grants under the Emergency School Aid Act, 20 U.S.C. (Supp. V 1979) 3191 *et seq.* were held by the court to violate paragraph 15.1 of the consent decree, notwithstanding the nationwide scope of these decisions (Pet. App. 236a-240a, 242a).

Additionally, the court found violations in the Secretary's refusal to seek congressional reappropriation of miscellaneous unused funds about to lapse into the Treasury so that these funds could be redirected for Chicago's desegregation plan (Pet. App. 244a-245a). The court reasoned that paragraph 15.1 bound the Executive Branch to use every power at its disposal to find and provide funding for the Board and that every failure to use those powers constituted a violation (Pet. App. 254a-255a). According to the district court, even if use of legislative-type powers were *not* contemplated by paragraph 15.1, the use of these powers to make funds *unavailable* demonstrated bad faith (Pet. App. 252a-253a).

Finally, the court concluded that the United States' "bad faith" had altered its obligation. Whatever that obligation had been originally, now the United States under paragraph

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[4]The structure of the ECIA allowed a greater number of school districts to use the funds for a larger variety of projects (including desegregation). This potentially, though not necessarily, reduced the amount of money available to a district such as Chicago, which previously (when not in violation of applicable laws, including the civil rights laws) had been eligible for categorical grants of funds to be used exclusively for purposes of desegregation.

15.1 was required to furnish funds in an amount equal to the difference between the funds budgeted by the Board and the amount "adequate for full implementation" of the desegregation plan. Pet. App. 262a-264a.[5]

The court issued a preliminary injunction prohibiting the United States from spending before August major portions of the Discretionary Fund and Special Programs and Populations Account, and directed the government to take steps to prevent the lapse of certain "excess" funds that might eventually be put to the use of the Board's desegregation plan (Pet. App. 265a-267a). In addition, the court enjoined the government to take certain administrative and legislative affirmative steps to find and provide additional funds for Chicago (*id.* at 264a-265a).

2. On the first appeal, the court of appeals held that paragraph 15.1 imposes a substantial obligation on the government to provide *available* funds to the Board (Pet. App. 276a), and that this obligation involves more than rendering procedural assistance (*ibid.*). The court specifically declined to address whether a finding of bad faith could be based upon legislative recommendations or policy decisions by the United States, or whether the court could direct the government to seek legislation (*id.* at 276a-277a). The court of appeals affirmed the district court's judgment on the narrower ground that the United States had breached the consent decree to the extent that there were funds available that the government had not given to Chicago (*ibid.*). At the same time, the court noted that the district court's findings regarding the availability of Title IV and Discretionary funds were contradictory and unclear (*id.* at 277a n.8). The court also held that, while a "temporary" freeze on the Secretary's ability to expend certain funds

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[5]That amount was found to be $14.6 million (*id.* at 264a); the source of that figure is unclear.

was appropriate, the district court acted with excessive dispatch by imposing a detailed remedy before giving the Executive Branch an opportunity to formulate a remedial proposal (*id.* at 279a).

3. Soon after the first appeal was decided, Congress took two actions that relate directly to this case. On October 1, 1983, Congress passed a temporary appropriation for FY 1984 in the form of a continuing resolution (Pub. L. No. 98-107, 97 Stat. 733 *et seq.*), which contained a provision inserted by Representative Yates of Chicago appropriating $20 million for the express purpose of funding the consent decree.[6] Three days later Senator Weicker introduced an amendment to the Senate version of the Department of Education Appropriation Act for FY 1984. That provision, which was designed to relieve other grantees from the district court's freeze (Pet. App. 184a-185a), ultimately was incorporated in the conference bill that passed on October 31, 1983 (Pub. L. No. 98-139, § 309, 97 Stat. 895). It provides:

> No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for Northern District of Illinois on June 30, 1983: Provided, That the court's decree entered on September 24, 1980, shall remain in full force and effect.

In light of these congressional actions, the United States moved that the Board's petition be dismissed on the ground that the Yates bill fully satisfied any obligation that the United States might have under paragraph 15.1 of the

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[6]This provision was initially passed by Congress as a separate bill (Pub. L. No. 98-107, 97 Stat. 733 *et seq.*), and was vetoed by the President on constitutional grounds. See *Desegregation Funds for the Chicago Board of Education*, 19 Weekly Comp. Pres. Doc. 1133 (Aug. 13, 1983).

Decree and that none of the frozen funds were any longer even arguably "available" (Docket Nos. 363-364). The district court denied that motion on November 21, 1983 (Docket No. 379).

4. The district court held a status hearing on October 5, 1983, and decided that an evidentiary hearing was needed to determine the level of funding the Board needed to implement its desegregation plan. Rejecting the United States' contention that such a hearing exceeded the court of appeals' remand instructions, the court held a hearing in March 1984 and issued an opinion on June 8, 1984 (Pet. App. 18a).

In its June 1984 opinion, the district court reaffirmed its prior interpretation of paragraph 15.1 (Pet. App. 150a-151a, 156a-162a). It found that the Board's unfunded needs for implementation of the desegregation plan in the 1984-1985 school year totalled $103.858 million (*id.* at 165a). The court held that the United States was "obligated to make every good faith effort to find and provide" that sum (*ibid.*). The district court also found that the government had acted in bad faith by failing to provide certain funds, by failing to lobby the Congress for additional funds, by deciding not to provide direct grants to local educational agencies, by lobbying against passage of the Yates Bill, by seeking a different version of the Weicker Amendment, by redrafting certain administrative regulations, and by submitting an inadequate plan for funding the Board's efforts (Pet. App. 196a-200a). Because of paragraph 15.1 and the government's "bad faith," the court ruled that the Executive Branch promptly had to lobby Congress to obtain additional funds (Pet. App. 207a).

On August 13, 1984, the district court entered its remedial order (Pet. App. 216a). That order charged the United States with an obligation to provide the Board with

$103.858 million for implementation of its desegregation plan (*id.* at 226a-227a). The court further ordered the Executive Branch to take "every step within its legal authority" (*id.* at 226a) to provide that amount. Those steps, documented in the court's Conclusions Nos. 131-143 of June 8 (Pet. App. 48a-53a), were both administrative and legislative in nature. Such steps included reporting to Congress the substance of the court's opinion and the need for new funds, requesting reappropriations of excess 1983 funds (and, later, excess funds for subsequent years), requesting reappropriation of 1984 Department of Education funds, seeking Fiscal Year 1985 funds, taking other legislative initiatives to make funds available to the Board, and opposing legislation designed to make funds unavailable to the Board (*id.* at 202a-208a). The Order further directed the United States to turn over to the Board all $17.0 million of FY 1984 money remaining of the frozen Discretionary Fund, and one-half ($11.775 million) of the remaining frozen Title IV funds, by August 22, 1984 (*id.* at 227a-228a). The United States was required to formulate a plan by October 1 of each year to come up with the rest of the $103.858 million for this year and a similar amount for each school year for the foreseeable future (*id.* at 228a-231a).

5. The United States appealed the district court's 1984 opinion and remedial order. The United States' first argument on appeal was that the district court erred in interpreting paragraph 15.1 to require the Executive Branch to engage in legislative activity, to pay the difference between the Board's needs for implementation of its desegregation plan and the money it had budgeted for that purpose, and to award Title IV and Discretionary Funds to the Board without regard to other grantees. Pet. App. 8a. In support of its interpretation, the United States contended that it would not have agreed to fund all of the Board's desegregation costs at the expense of other grantees contrary to the purposes of the applicable appropriations statutes, nor to

relinquish its constitutional authority to formulate policy and engage in legislative activity. The United States also contended that, even if the district court were correct in its interpretation of paragraph 15.1, that portion of the decree would be unenforceable because it would be inconsistent with the constitutional allocation of powers (Pet. App. 8a).

In the decision petitioner urges this Court to review, the court of appeals never reached the constitutional issues. Rather, in reliance on the intent of the parties, it rejected the district court's interpretation of paragraph 15.1 of the decree (Pet. App. 12a). "After closely examining the extrinsic evidence surrounding the adoption of ¶ 15.1," the court of appeals ruled that the parties did not "ha[ve] any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts" (*id.* at 13a). The court ruled (*id.* at 11a) that the government's funding obligations under the decree are satisfied by funding the Board on a priority basis under existing school desegregation programs in accordance with program criteria. Therefore, the court held, "¶ 15.1 does not require the government to engage in legislative activities in order to make desegregation funds available" (*id.* at 14a).

Because of this construction of paragraph 15.1, the court of appeals found erroneous the district court's conclusions that the United States acted in bad faith by failing to request congressional appropriations for the Board (Pet. App. 13a-14a). The court also held that the decision not to reprogram funds for use by the Board was not bad faith (*id.* at 14a & n.9). With respect to the Executive Branch's policy decision to redirect federal educational funding toward block grants instead of categorical grants, the court of appeals ruled that this did not constitute bad faith because the decision applied to all school districts and did not demonstrate intent by the United States to avoid its obligations under the decree (*ibid.*). The court did not reach the question whether the

United States acted in bad faith by lobbying against passage of the Yates Amendment and for changes in the Weicker Amendment, because it held that the award of $103.858 million as a penalty for such bad faith was an abuse of discretion. The order was "unreasonable," since it would leave no federal desegregation money for other school districts. *Id.* at 15a. If any remedy were required, the "proper remedy for any bad faith violations of the Decree in connection with the Yates-Weicker activities would have been a civil contempt citation under which the district court could have ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under the Decree" (*id.* at 15a-16a). Since the "time for such a remedial measure has passed," however, the court of appeals did not need to resolve whether in fact the government's Yates-Weicker legislative efforts were in violation of the decree (*id.* at 16a).

The court of appeals found it unnecessary to consider whether the Executive Branch's congressional lobbying activities are reviewable by the judiciary (Pet. App. 16a). The court remanded the case for a determination of "whether the Board is receiving the maximum level of funding that is available under the criteria of programs through which funds for desegregation can be disbursed" and, if the Board's needs are still unmet, whether the government has fulfilled its " 'duty to search among funds that Congress had indeed made . . . available' " (*id.* at 13a, citing district court transcript of April 5, 1984, at 1416 (ellipsis supplied by the court of appeals)).

ARGUMENT

As this case reached the court of appeals, it appeared to present grave constitutional issues of great significance. The district court had interpreted a consent decree entered into by the United States as plaintiff and the Board as defendant, providing that both parties would "make every good faith

effort" to find and provide available funds for the desegregation plan, as requiring the United States to meet the Board's annual budgetary shortfall, which exceeds $100 million. The district court further presumed to determine that the President's legislative program before the Congress, including a major restructuring of federal educational assistance affecting every school district in the nation, constituted a "bad faith" violation of the consent decree, and purported to enjoin the Executive Branch to change that legislative program in specific ways in compliance with the district court's views of how money might be found for Chicago. Obviously, the court's order intruded deeply and impermissibly into the political functions and discretion of the Executive Branch.

The court of appeals, however, declined to address any of the constitutional difficulties created by the district court's order. It simply interpreted the consent decree as it was written, in light of extrinsic evidence of the intent of the parties.

As the case reaches this Court, therefore, no constitutional issues remain. All that is presented for this Court's review is the court of appeals' sensible, fact-bound interpretation of one consent decree. Petitioner's attempt to raise constitutional questions where none exist should be rejected.

1. Petitioner contends (Pet. 20) that the "rule of law" is somehow "undermined" by the decision below, apparently because the court of appeals allegedly construed the consent decree in light of separation of powers principles. However, the opinion below belies any such suggestion. Although petitioner suggests that the decision "obviously derived" from the appellate court's constitutional concerns (Pet. 18), petitioner cannot point to a single word in the court's opinion indicating that such considerations played any role in its construction of the meaning of the consent decree (compare

Pet. 22-26 with Pet. App. 9a-13a).[7] Indeed, it is clear from the court's opinion that its interpretation of paragraph 15.1 was based on the words of the agreement and the extrinsic evidence of the intent of the parties. In an excerpt typical of its analysis, the court of appeals explained (Pet. App. 13a):

> After closely examining the extrinsic evidence surrounding the adoption of ¶ 15.1 into the Decree, we must conclude that there is inadequate support for the district court's interpretation. In the parties' stipulation regarding the negotiations leading to the adoption of ¶ 15.1, we find no indication that the parties had any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts. To the extent that the district court reads the June 19, 1980, letter from Assistant Attorney General Drew Days to the Board as indicating that the parties contemplated legislative initiatives on the part of the Executive Branch to make funds available, *see* 1984 Conclusion of Law No. 139, we find this reading to be clearly erroneous. The applicable wording in this letter tracks the language in ¶ 15.1 and does not amplify or further explain the parties' intent.

The court of appeals never stated that the Executive can "irrespective of the Decree, make any decision it wants" (Pet. 22); indeed, it stated just the opposite (Pet. App. 11a n.7 ("¶ 15.1 binds the Secretary of Education's discretion with respect to funds that may be used for school desegregation pursuant to congressional appropriation")). Nor, obviously, did the court of appeals hold that a consent

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[7]We do not mean to imply that there would be anything amiss had the court adopted a construction of the consent decree to avoid unnecessary constitutional questions (see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring); *Alliance to End Repression* v. *City of Chicago*, 742 F.2d 1007 (7th Cir. 1984) (en banc)). We simply note that the court of appeals in fact interpreted the decree without reliance on any such canon of construction.

decree *cannot* constrain the discretionary decisionmaking authority of the Executive Branch (cf. Pet. 22-23). Rather, the court held that *this* decree, when interpreted in accordance with its language and the parties' intent, did not require the United States to do what petitioner sought.

For this reason, the court of appeals did not reach a second issue raised by petitioner, *i.e.*, whether a court can compel the Executive Branch to engage in legislative lobbying (Pet. 26-28). Such a ruling would not have been proper, given the court's interpretation of the decree as not requiring such activity (Pet. App. 129a). In sum, petitioner seeks review of issues the court below did not consider and reversal of rulings it did not make.[8] See *Smith* v. *Butler*, 366 U.S. 161 (1961) (writ of certiorari dismissed when the decision below did not turn on issues on the basis of which certiorari was granted); *United States* v. *Rimer*, 220 U.S. 547 (1911) (same); cf. *Conway* v. *California Adult Authority*, 396 U.S. 107 (1969) (writ of certiorari dismissed where subsequently discovered facts rendered the issue on which certiorari was granted hypothetical).

2. The only issue arguably encompassed within petitioner's first two questions presented that is ripe for review is whether the court of appeals properly construed paragraph 15.1. However, the court of appeals' interpretation was based largely upon a careful examination of the facts illustrating the intent of the parties (Pet. App. 9a-13a); the

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[8]To be sure, the United States argued below that, even if the parties had intended the Executive Branch to engage in particular lobbying activities, the judiciary could not, consistent with the constitutional separation of powers, order the Executive Branch to do so (see Pet. App. 8a). We adhere to that position. But since the court of appeals properly interpreted the decree as not requiring the Executive Branch to undertake particular legislative activities and never considered the constitutional issue, we will not burden this Court with a lengthy response to petitioner's hypothetical arguments.

court's fact-specific conclusion does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

The court of appeals' interpretation, in any event, is clearly correct. The language of the consent decree does not permit the construction that the Executive Branch undertook to engage in legislative lobbying or to guarantee with federal funds the Board's annual assessment of its unmet needs. Paragraph 15.1 obligates the United States to make a good faith effort to "find and provide * * * every *available* form of financial resources" for the Board's desegregation plan (emphasis added). The term "available" is a common term in appropriations law; it means funds that have been appropriated for a given purpose by Congress under Article I, Section 9 of the Constitution. An appropriations bill, by its nature, limits the availability of funds for obligation to specified purposes, time, and amount. See GAO, *Principles of Federal Appropriations Law* 3-2 (1982). Unless funds have been appropriated for that purpose and that time, they are not "available" as that term is ordinarily understood.

Moreover, as the court of appeals pointed out (Pet. App. 13a), no extrinsic evidence suggests that "the parties had any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts." It is fanciful to suggest that the United States would have agreed to commit to the Board all funds in the Secretary of Education's Discretionary Fund and one-half of all funds in the Title IV account (in contravention of the valid statutory criteria and policy decisions that would otherwise govern the Secretary's distribution of these funds among potential grantees) in order to settle a lawsuit in which the United States was plaintiff (with no potential monetary liability) and petitioner the defendant.

In any event, petitioner does not directly challenge the court of appeals' interpretation of the decree, except to suggest incorrectly that it rested on certain constitutional principles. For reasons stated above, that suggestion does not raise any issue warranting further review.

3. Petitioner's final question presented concerns the remedies available against the Executive Branch for violation of a consent decree (Pet. 28-29). The district court awarded the Board $103.858 million in federal funds for the first year and required the United States to develop a plan for payment of a similar amount in each subsequent school year (Pet. App. 228a-231a). The justification for this award was a variety of violations summarized by the district court as: failing to provide available funds, lobbying against legislation to provide federal funds, lobbying for legislation to make funds unavailable, and otherwise acting to make funds unavailable (*id.* at 220a). Petitioner suggests the award was necessary to make it whole for these "violations" (Pet. 28).

But the court of appeals found that the United States' activities were not in violation of the decree (Pet. App. 13a). The court of appeals also reversed the district court's finding that the Executive Branch acted in bad faith by failing to lobby Congress for funds, since such behavior was not required by the decree (Pet. App. 13a-14a). Similarly, the court found erroneous the trial court's view that the failure to provide direct categorical grants showed bad faith, because that "policy decision applies to all school districts and does not indicate intent on the part of the United States specifically to avoid its obligation under ¶ 15.1" (*id.* at 14a). Finally, the court ruled that it was an abuse of discretion to award almost $104 million because the United States lobbied against the Yates Amendment and for changes in the

Weicker Amendment.[9] The court of appeals reached this conclusion because the record demonstrated that this penalty would have resulted in no federal desegregation money being available for other school districts (Pet. App. 15a). When viewed in this light, there is no merit in petitioner's suggestion that the district court's order merely restored petitioner to the position it would have been in but for the violation (Pet. 28).

Accordingly, this case does not, as petitioner contends (Pet. 28), raise the "critical issue" of "whether there is a limitation on the powers of an Article III court to remedy violations of the Decree by steps which go beyond merely stopping the complained of activity." The court simply found that the district court abused its discretion by ordering an enormous and disproportionate monetary remedy without regard to the consequences. This holding presents no question of general applicability requiring review by this Court.

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[9]The court of appeals reserved the question whether the President's submission of a section of the Department of Education's Fiscal Year 1984 budget to Congress constituted bad faith (Pet. App. 16a-17a). This issue was noted as a possible issue on remand to the district court and is in an interlocutory posture (*ibid.*). Moreover, the court of appeals did not decide whether the Executive Branch's (unsuccessful) legislative activities with respect to the Yates and Weicker amendments were in bad faith violation of the decree, because, even assuming they were, the "time for [the proper] remedial measure ha[d] passed" (*id.* at 16a). While we do not consider the President's interactions with Congress to be judicially reviewable, and disagree with the court of appeals about what remedy would be "proper" (*id.* at 15a) in this context, the court's disposition of the issue makes unnecessary any review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submi'ted.

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APRIL 1985

DOJ-1985-04

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

The Brief of the United States in Opposition acknowledges that legal issues of major importance have been involved in this case. [Brief in Opposition, pp. 11, 14 n8] Nonetheless, it asserts that review by this Court is inappropriate because, it asserts, the decision of the Court of Appeals was based not on the constitutional issues of the case but on a "fact-bound" review of the provisions of the consent decree. [Brief in Opposition, pp. 12-15] The United States, moreover, submits that the decision is correct in that it is consistent with the ordinary understanding of the meaning of "available" funds. [Brief in Opposition, p. 15]

The Brief of the United States in Opposition fails to deal with the central issues presented by the decision below. In its desire to present the decision of the Court of Appeals as a modest and reasonable interpretation of the decree, the United States simply fails to deal with the heart of that decision—the holding that the Executive Branch has the discretionary power to decide whether or not to provide the Board with its equitable share of *funds which were appropriated* for purposes which include school desegregation.

The Board also submits that the central aspects of the decision of the Court of Appeals were indeed constitutionally derived. In any event, and more significantly, the decision of the Court of Appeals raises important governmental powers issues, whether it is read as based on a textual interpretation of the consent decree or on underlying constitutional requirements.

1. The Brief of the United States in Opposition Fails to Present the Key Aspects of the Decision Below as to Which Review is Sought.

The United States describes the decision below as simply requiring the United States under the consent decree to provide the Board with an equitable share of the amounts appropriated by Congress for purposes which could be used for the Board's desegregation plan. [Brief in Opposition, p. 15] Had this been the holding, the Board would not be seeking review. The Board has never claimed that it has the right to receive funds not appropriated by Congress for purposes which comprise the activities of the desegregation plan. Neither has it contended that it is entitled to all of the available desegregation funds without regard to the needs of other school districts.

However, what the Court of Appeals ruled is that the Executive Branch was entitled, in the exercise of its own discretion, to decide *not* to provide to the Board funds which *were* appropriated by Congress for purposes which comprise the elements of the Board's desegregation plan. There have been

very substantial amounts appropriated by law for purposes which include school desegregation but as to which the Executive Branch has decided not so to use.

The Court of Appeals held that the obligation of the United States would be satisfied if the Board were to

> be funded on a priority basis under existing school desegregation programs, *the amount of which funding is determined by program criteria* [to be determined by the Executive Branch]. . . . (Appendix, p. 11a, emphasis supplied)

This holding leaves it open to the Executive Branch, unless compelled by the terms of an appropriation law, to decide whether appropriated money should be used for funding the Board's plan. Thus, for example, it was held not a bad faith violation of the decree for the Executive Branch to decide that none of the Discretionary Fund (which the authorizing legislation allows to be used for desegregation purposes) would be used for the Board's plan [Appendix, p. 14a n.10] or to decide that none of the Title IV desegregation appropriations would be used for a grant to the Board for the plan [Appendix, p. 14a]

In each of these respects, the decision of the Court of Appeals in essence upheld the argument of the government that only funds which the Executive Branch decides, regardless of appropriation by Congress, should be spent for Chicago school desegregation were "available" for that purpose. The Brief of the United States, by not focusing on this key aspect of the decision, has failed adequately to address the actual issues pending before this Court.

2. The Decision of the Court of Appeals is Inconsistent with the United States' Own Understanding of the Phrase "Available Funds."

The Brief in Opposition [p. 15] asserts that the interpretation given the decree by the Court of Appeals was correct in that it coincides with the common meaning given the phrase

"available funds." "Available funds" are said to be those amounts which

> have been appropriated for a given purpose by Congress. . . . Unless funds have been appropriated for that purpose and that time, they are not "available" as that term is ordinarily understood. [Brief in Opposition, p. 15]

In fact, however, this is not the interpretation given the consent decree by the Court of Appeals. It held in effect that available funds are not those appropriated by Congress for the purpose in question, but rather those which are so appropriated *and* which the Executive Branch, in its discretion, decides to use for that particular purpose. Ironically, the Court of Appeals' interpretation of the consent decree is thus contrary to the interpretive standard put forward by the United States in its own Brief claiming the decision was correct.

3. The Decision of the Court of Appeals Was Constitutionally Based.

The Brief in Opposition is similarly off the mark when it states that the interpretation put on the consent decree was not constitutionally based (although, the Brief [p. 13, n.7] acknowledges, it might have been). The assertion of the Brief in Opposition [p. 12] that "petitioner cannot point to a single word in the court's opinion indicating that such [constitutional] considerations played any role in its construction of the meaning of the consent decree" is erroneous. The decision of the Court of Appeals concerning the exercise of Executive discretion does speak in terms of interpreting the words of the decree, but the Court appears to have indicated that its interpretation derived from constitutional concerns. (Contrary to the argument of the Brief in Opposition [p. 15], the holding on the Executive discretion point was not based on "factbound" extrinsic evidence of intent, but was a direct textual inter-

pretation.* The Court of Appeals decisions do indeed indicate that this holding was constitutionally rooted.)

The Court of Appeals in its first decision indicated that constitutional questions attended an interpretation of the decree that limited overall policy decisions by the Executive Branch.

> A significant constitutional issue may exist as to whether a finding of lack of good faith can be based upon such a series of sweeping Executive policy decisions and recommendations. [Appendix, p. 276a]

In summing up its second decision, the Court of Appeals further indicated that constitutional forces were in play in its decision as to the ability of the United States to exercise its discretion to make funds unavailable to the Board.

> In the circumstances of this case, we deem it important to note that the actions of the Executive Branch *could be interpreted to contravene the spirit of the Decree. Such actions while perhaps within constitutional limits,* cannot enhance the respect to which this Decree is entitled and do not benefit a signatory of the stature of the United States Department of Justice. [Appendix, p. 17a, emphasis supplied]

4. Whether the Decision Below is Read as Being Constitutionally or Textually Based, it Nonetheless Raises Significant Issues Appropriate for Review by this Court.

Regardless of its sources, the decision of the Court of Appeals means that which funds are provided for the Board's plan rests in the exercise of discretion of the Executive Branch. To posit such an exception to generally understood legal duties arising from a consent decree is to raise a substantial question as to the relative authority of the various branches of the

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* The extrinsic evidence regarding intent went to the issue of the obligation of the Executive Branch to seek legislation (also now presented for review), not the issue of Executive discretion.

government. In essence, it is to hold that the authority of the judiciary (and its enforcement of the law) must give way to the discretion of the Executive Branch. Such an interpretation, whether derived constitutionally or otherwise, presents a substantial issue concerning the legal powers of the respective branches of government which should be, but has not been, addressed by this Court.

The Brief in Opposition contents itself with arguing that the decision below was not plainly based on constitutional limitations. This is basically beside the point. The rule of law is undermined just the same where a doctrine of Executive discretion is read into the language of a decree as where it is thought to be constitutionally derived. In each instance, the Executive Branch is allowed to be the judge of the extent to which it will carry out the language of its obligations.

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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